

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 132

OLLIE OTTO PRINCE, PETITIONER,

VS.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

INDEX

	Original	Print
Record from the United States District Court for the Western District of Texas	1	1
Caption	1	
Indictment	2	1
Judgment, sentence and order	3	2
Order amending judgment and sentence	6	4
Motion to vacate or correct illegal sentence	7	5
Order overruling motion to vacate or correct illegal sentence	8	6
Notice of appeal	9	6
Designation of record	10	
Clerk's certificate	11	
Proceedings in the United States Court of Appeals for the Fifth Circuit	13	8
Opinion, Tuttle, J.	13	8
Judgment	22	14
Clerk's certificate	23	
Order granting motion for leave to proceed in forma pauperis and petition for certiorari	24	15

[1] [Caption omitted]

[2] In United States District Court for the Western
District of Texas

No. 4292 Criminal

(18 U.S.C., Sec. 2113(a) & (d))

UNITED STATES OF AMERICA

VS.

OLLIE OTTO PRINCE

INDICTMENT—Filed March 21, 1949

The grand jury charges:

On or about October 5, 1948, in Hill County, Texas, within the Waco Division of said district, OLLIE OTTO PRINCE, by intimidating Guy Mann, feloniously took from the presence of the said Guy Mann Fifteen Thousand Seven Hundred Sixty-four Dollars (\$15,764.00), in money, which said money then belonged to the Malone State Bank, of Malone, Texas, and which said bank was then a banking association incorporated under the laws of the State of Texas, and was then an insured bank under the meaning of the provisions of Section 264, Title 12, United States Code, relating to Federal Deposit Insurance Corporation, and in committing the offense above described the said OLLIE OTTO PRINCE put the life of Guy Mann in jeopardy by the use of a dangerous weapon, to wit, a pistol.

SECOND COUNT

At the time and place and within the jurisdiction, all as described in the first count hereof, OLLIE OTTO PRINCE entered the bank described in said first count, with intent to commit therein a felony, to wit, robbery.

A true Bill,

(S.) G. C. HAGELSTEIN,

Foreman.

— (S.) H. W. MOURSUND,

United States Attorney.

Filed: March 21st, 1949.

Endorsed: March 14, 1949—Bond of defendant set at \$12,500.00, to be taken by a U. S. Commissioner.

(Signed) BEN H. RICE, JR.,
United States District Judge.

[3] In United States District Court

JUDGMENT, SENTENCE AND ORDER—November 22, 1949

On November 21, 1949, this cause coming on to be heard, came the United States by their District Attorney, and came also the defendant, Ollie Otto Prince, in our own proper person and by counsel. Thereupon a jury was duly selected, empanelled and sworn, to wit, J. O. Ashton and eleven others, and two alternate jurors were selected empanelled and sworn, the defendant was arraigned, the indictment was read and the defendant pleaded not guilty to the charges contained in both counts thereof. Defendant's motion to dismiss the second count of the indictment and his motion to exclude from the evidence the record of his prior conviction were represented to the Court and duly overruled. The trial proceeded with the introduction of evidence on behalf of the United States, at the conclusion of which defendant's motion for an instructed verdict of not guilty was by the Court overruled. The trial then proceeded with the introduction of evidence on behalf of the defendant, and at the conclusion of which both parties rested. Said jury having heard the indictment read, defendant's plea of not guilty thereto, and having heard the evidence introduced and argument of counsel, and having been duly charged by the Court on November 22, 1949, retired in charge of the proper officer to consider of their verdict, and afterwards were brought into open court by the proper officer, the defendant and his counsel being present, and in due form of law returned into open court the following verdict, which was received by the Court and is now here entered upon the minutes of the court, to wit:

“Verdict of the jury in the case of the United States of America vs. Ollie Otto Prince, No. 4292 Criminal:

We, the jury, find the defendant, Ollie Otto Prince guilty, as charged in the first count of the indictment, and guilty, as charged in the second count thereof.

J. O. Ashton, Foreman”

WHEREFORE, it is considered and adjudged by the Court that the defendant, Ollie Otto Prince, is guilty, as found by the jury, of the offense of having, on or about October

5, 1948, in Hill County, [4] Texas, within the Waco Division of the Western District of Texas, by intimidating Guy Mann, feloniously took from the presence of the said Guy Mann Fifteen Thousand Seven Hundred Sixty-four Dollars (\$15,764.00), in money, which said money then belonged to the Malone State Bank, of Malone, Texas, and which said bank was then a banking association incorporated under the laws of the State of Texas, and was then an insured bank within the meaning of the provisions of Section 264, Title 12, United States Code, relating to Federal Deposit Insurance Corporation, and in committing the offense said Ollie Otto Prince put the life of Guy Mann in jeopardy by the use of a dangerous weapon, to wit, a pistol, as charged in the first count of the indictment; and

of the offense of having, at the time and place and within the jurisdiction aforesaid, entered the bank described in said first count, with intent to commit therein, a felony, to wit, robbery, as charged in the second count thereof.

Now, on this the 22nd day of November, 1949, said defendant being brought into open court for the purpose of sentence, and being asked by the court if he had anything to say why the sentence of the law should not be pronounced against him, and he answering nothing in bar thereof.

It is the order and sentence of the Court that the defendant, Ollie Otto Prince, for the said offense by him committed and charged in the first count of the indictment, be imprisoned for the period of TWENTY (20) YEARS in an institution to be designated by the Attorney General of the United States, this sentence to begin upon the expiration of the sentence imposed on March 3, 1949, in Criminal Cause No. 12126, styled, United States vs. Ollie Otto Prince, in the Northern District of Texas, Dallas Division.

It is the further order and sentence of the Court that the defendant, Ollie Otto Prince, for the said offense by him committed and charged in the second count of the indictment, be imprisoned for the period of FIFTEEN (15) YEARS in an institution to be designated by the Attorney General of the United States, this sentence under the second count of the indictment to begin upon the expiration of the sentence imposed herein under the first count hereof, and the said defendant be, and he is hereby, committed to the cus-

tody of said [5] Attorney General or his authorized representative.

It is further ordered by the Court that said defendant be temporarily held in custody by the United States Marshall for the Western District of Texas pending definite designation of the place of confinement for the service of the sentence herein imposed, the disposition of motion for new trial, if filed, and the time allowed for taking appeal. If appeal be taken, the appellant shall be similarly held pending the determination thereof, unless bail is allowed or election made to enter upon service of the sentence. A certified copy of this order shall be authority to said Marshall for his action in the premises.

Ordered in open court at Waco, Texas, this the 22nd day of November, 1949.

(Signed) BEN H. RICE, JR.,
United States District Judge.

Approved:

H. W. MOURSUND,
United States Attorney.

(S.) H. W. MOURSUND,
U. S. Attorney.

Filed: November 22, 1949.

[6] In United States District Court

ORDER AMENDING JUDGMENT AND SENTENCE—February 27,
1950

On this day the defendant, Ollie Otto Prince, appeared in person and by counsel before the court and within sixty (60) days after receipt by the court of the mandate dismissing the appeal in this cause, at which time the court amended the judgment and sentence entered herein on the 22nd day of November, 1949, as follows:

It is ordered that the following portion of paragraph four of the judgment entered on the 22nd day of November, 1949, be deleted therefrom.

" . . . , this sentence to begin upon the expiration of the sentence imposed on March 3, 1949, in Criminal

Cause No. 12126, styled, United States vs. Ollie Otto Prince, in the Northern District of Texas, Dallas Division."

and substituted therefor the following:

" . . . , this sentence to begin on the 22nd day of November, 1949."

ORDERED in open court at Waco, Texas, this the 27th day of February, A. D. 1950.

(Signed) BEN H. RICE, JR.,
United States District Judge.

Approved:

(S.) H. W. Moursund,
H. W. MOURSUND,
United States Attorney.

Filed: February 27, 1950.

[7] In United States District Court

MOTION TO VACATE OR CORRECT ILLEGAL SENTENCE—Filed
June 24, 1955

The defendant, Ollie Otto Prince, moves the court to vacate or correct the sentence imposed on him in the above entitled case upon the following grounds and reasons:

1. The sentence was imposed in violation of the Constitution and laws of the United States.

2. The court was without jurisdiction to impose the sentence.

3. The sentence was in excess of the maximum allowed by law in that 18 U.S.C. Sec. 2113 provides the maximum punishment of twenty-five years for the offense for which this defendant was convicted, whereas the defendant was sentenced on two counts of twenty years and fifteen years, respectively, to run consecutively, or for a total of thirty-five years.

This motion is made upon the records and files in the above entitled case.

COHEN & SCHNIDER,
By (S.) Joseph P. Jenkins,

*711 Huron Building,
Kansas City, Kansas,*
(S.) John W. Laird,
JOHN W. LAIRD,
*333 Perry-Brooks Building,
Austin, Texas,*
Attorneys for the Defendant.

Filed: June 24, 1955.

[8] In United States District Court

ORDER OVERRULING MOTION TO VACATE OR CORRECT ILLEGAL
SENTENCE—Filed August 1, 1955

The court having heard, on the 12th day of July, 1955, defendant's motion to vacate or to correct illegal sentence, and the court finds that said motion should be overruled.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, on this 27th day of July, 1955, the defendant's motion to vacate or correct illegal sentence be and the same is hereby overruled.

(Signed) BEN H. RICE, JR.,
Judge.

Filed: August 1, 1955.

[9-10] In United States District Court

NOTICE OF APPEAL—Filed August 4, 1955

The appellant is Ollie Otto Prince, P.O. Box 1200, Leavenworth, Kansas.

Appellant's attorneys are Cohen & Schnider, 711 Huron Building, Kansas City, Kansas; and John W. Laird, 1204 Perry-Brooks Building, Austin, Texas,

The offenses appellant was charged with and convicted of were violation of 18 U.S.C. Section 2113(a) and (d).

On August 1, 1955, this court entered an order overruling appellant's motion to vacate or modify the sentences imposed by this court on the 22nd day of November, 1949, whereby appellant was sentenced to a term of twenty years for violation of 18 U.S.C. Section 2113(a) and fifteen years for violation of 18 U.S.C. Section 2113(d), the second sentence to run consecutively with the first.

The appellant is now confined to the United States Penitentiary, Leavenworth, Kansas.

The above named appellant hereby appeals to the United States Court of Appeals for the Fifth Circuit from the above stated judgment.

Dated August 3, 1955.

COHEN & SCHNIDER,
By (S) Joseph P. Jenkins,
711 Huron Building,
Kansas City, Kansas,
(S) John W. Laird,
JOHN W. LAIRD,
1204 Perry-Brooks Building,
Austin, Texas,
Attorneys for Appellant.

Filed: August 4, 1955.

[11-12] Clerk's Certificate to foregoing transcript omitted in printing.

[13] In the United States Court of Appeals for the
Fifth Circuit

No. 15755

OLLIE OTTO PRINCE, *Appellant*,

versus

UNITED STATES OF AMERICA, *Appellee*

Appeal from the United States District Court for the
Western District of Texas

OPINION—February 29, 1956

Before BORAH, TUTTLE and JONES, Circuit Judges.

TUTTLE, Circuit Judge: In this appeal from the overruling of his motion for a reduction of sentence,¹ the appellant raises here again the question of merger among the various subsection of 18 U.S.C.A. § 2113, sometimes referred to as the Bank Robbery Act. In 1949 he was convicted under both counts of a two-count indictment of (1) entering a bank insured by the Federal Deposit [14] Insurance Corporation with intent to commit a felony therein and (2) feloniously and by intimidation taking \$15,764 of the bank's money from the presence of Guy Mann, while putting the life of said Guy Mann in jeopardy by the use of a dangerous weapon, to wit, a pistol. He was thereafter sentenced to a term of twenty years under the first count and fifteen years under the second, to be served consecutively. The substance of his argument is that the first count is merged in the second, with the result that either one or the other of the sentences must be set aside as illegal.

The same issue was before this court in *Durrett v. United States*, (5 Cir.), 107 F. 2d 438, and *Wells v. United States*, (5 Cir.), 124 F. 2d 355, and each time resulted in a decision contrary to this appellant's position. He urges, however, that subsequent events, in the form of Wells' release from

¹ Made pursuant to Rule 35, Federal Rules of Criminal Procedure,

prison on the ground that his sentence was illegal,² and inconsistent interpretations of the statute by this and other Courts of Appeal, call for a re-examination of the Act and decisions thereunder.

Section 2113, Title 18, was passed by Congress in 1948 to replace 12 U.S.C.A. §§ 588a, 588b, and 588c, which were then repealed. Section 2113 is substantially a reenactment of the former statute, consolidating and slightly modifying the earlier act. Nothing in the reenactment affects the question of merger within the subsections, and both the prisoner and the government agree that for our purposes cases construing the 1934 statute are good authority for an interpretation of § 2113.

[15] The statute, set out below,³ seems to separate a typical bank robbery, as one might presume it to be, into var-

² Wells v. Swope, (D.C., N.D.Cal.), 121 F. Supp. 718.

³ "§ 2113. *Bank robbery and incidental crimes*

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association; or

Whoever enters or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part as a bank, or as a savings and loan association, with intent to commit in such bank, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny—

Shall be fined not more than \$5,000 or imprisoned not more than twenty years, or both.

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding \$100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than \$5,000 or imprisoned not more than ten years, or both; or

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding \$100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than \$1000 or imprisoned not more than one year, or both.

(c) Whoever receives, possesses, conceals, stores, barter, sells, or disposes of, any property or money or other thing of value knowing the same to have been taken from a bank, or a savings and loan association, in violation of subsection (b) of this section shall be subject to the punishment provided by said subsection (b) for the taker.

(d) Whoever, in committing, or in attempting to commit any offense defined in subsections (a) and (b) of this section, assaults any person,

ious stages, making criminal the commission of the acts constituting the progressive steps of the criminal undertaking. Thus, one paragraph of subsection (a) [16] makes criminal the entering of a bank⁴ or savings and loan association⁵ with the intent of committing a felony therein affecting the bank or savings and loan association. The other paragraph of subsection (a) makes criminal the taking of bank property by force and violence or intimidation from the person or presence of another. Subsection (b) makes criminal the taking and carrying away of bank property, when such act is done with intent to steal or purloin. Subsection (c) defines the crime of receiving property stolen from a bank or savings and loan association. Subsection (d) provides a heavier penalty when any of the acts defined in (a) or (b) are accomplished or attempted by putting anyone's life in jeopardy with the use of a dangerous weapon. Subsection (e) provides the death penalty, if the jury so directs, for killing or kidnapping done in committing any offense defined in the section.

Because of this statutory delineation of the various steps in a typical bank robbery, the question has arisen whether Congress intended that the criminal who succeeds in his unlawful enterprise to the extent of [17] accomplishing more than one phase of it, as the statute defines the phases,

or puts in jeopardy the life of any person by the use of a dangerous weapon or device; shall be fined not more than \$10,000 or imprisoned not more than twenty-five years, or both.

(e) Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or punished by death if the verdict of the jury shall so direct.

(f) As used in this section the term "bank" means any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States, and any bank the deposits of which are insured by the Federal Deposit Insurance Corporation.

(g) As used in this section the term "savings and loan association" means any Federal savings and loan association and any savings and loan association the accounts of which are insured by the Federal Savings and Loan Insurance Corporation."

⁴ As defined in § 2113(f).

⁵ As defined in § 2113(g).

can be punished for more than one crime. The Sixth Circuit has adopted the view that he cannot, *Simunov v. United States*, (6 Cir.), 162 F. 2d 314, and the Ninth Circuit in a clear dictum has indicated that it is in accord with this view. *Barkdoll v. United States*, (9 Cir.), 147 F. 2d 617.⁶

This construction of the statute cannot be supported by reference to the doctrine of merger, because except for the offenses of bank petit larceny and bank grand larceny defined in subsection (b), no crime defined in the statute contains all the elements of another crime defined therein.⁷ Aside from the two paragraphs of subsection (b), the offenses most identical to each other are those of larceny as defined in (b) and robbery as defined in the first paragraph of (a). These are differentiated, however, by the fact that larceny under the statute requires "the intent to steal or purloin," while this element of specific criminal intent is omitted from the first paragraph of (a), thus apparently making sufficient [18] for conviction under (a) only the general criminal intent to do the prohibited acts themselves.

Indeed, the view that subsections (a) and (b) constitute but one crime is not grounded on the doctrine of merger, but rests instead on presumed Congressional intention. Legislative history is not cited to sustain this interpretation, however. Instead, it is based on Congress's aims as manifested by the statute itself, the opinion of those who follow this interpretation being that since the main purpose of the statute is to make robberies of FDIC-in-

⁶ The Eighth Circuit has made the following analysis of the first paragraph of (a), in connection with (d) and (e): "Congress, in enacting Sections 588b and 588c, was dealing with the crime of bank robbery, and not with forcible taking, putting in fear, assault, putting lives in jeopardy, killing and kidnapping as distinct crimes. In effect, Congress created three classes of bank robbery according to degree: first, that which was accompanied by force or putting in fear; second, that which was accompanied by assault or putting lives in jeopardy; and, third, that which was accompanied by killing or kidnapping. Proof of robbery of the second class would also prove robbery of the first class, and proof of robbery of the third class would prove robbery of both the first and second classes." *Hewitt v. United States*, (8 Cir.), 110 F. 2d 1, 11.

⁷ This is the general test with regard to merger. *Miller on Criminal Law* § 13.

sured banks criminal, the statute will support only a conviction for the single offense of bank robbery or one phase thereof.⁸

In this respect, however, § 2113 is not an unusual type of enactment, and other statutes which punish separately the various steps of a criminal undertaking have not been construed as limited to supporting only one conviction. For example, under 18 U.S.C.A. §§ 659 and 2117, one may be convicted of the separate crimes of breaking the seal on a railroad car containing interstate shipments of freight, entering the car with intent to steal, and stealing property from the car. *Greenburg v. United States*, (7 Cir.), 253 Fed. 728. In applying this statute, formerly combined in 18 U.S.C.A. § 407, one court observed:

"We are unable to read the statute other than that Congress intended to make each and every separate act named, a separate crime. [Citing [19] cases.] If the construction seems harsh, it must also be appreciated that there is a vast difference between the maximum and the minimum sentence provision as there is a vast difference between the action and motives of different offenders. In the trial judge, there is lodged wide discretion, and if misjudgment results in too severe judgments, the accused may secure relief through executive clemency, as well as by parole." *United States v. Carpenter*, (7 Cir.), 143 F. 2d 47, 48.

We reach the same conclusion in this case. Under the 1934 statute, the weight of authority sustained convictions of more than one offense defined in what is now §2113(a) and (b). *McNealy v. United States*, (5 Cir.), 164 F. 2d 600; *Rawls v. United States*, (10 Cir.), 162 F. 2d 798; *Wells v. United States*, (5 Cir.), 124 F. 2d 334; *Durrett v. United States*, (5 Cir.), 107 F. 2d 438. In only one case was such a conviction struck down. *Simunov v. United States*, (6 Cir.), 162 F. 2d 314. Nevertheless, Congress reenacted the statute substantially as before. In the light of this fact, and of the analogous precedent of Congress's previous use of this same statutory pattern in other areas of the criminal

⁸ See *Simunov v. United States*, (6 Cir.), 162 F. 2d 314, 315; *Barkdoll v. United States*, (9 Cir.), 147 F. 2d 617; *Hewitt v. United States*, (8 Cir.), 110 F. 2d 1, 11.

law, we find ourselves unable to agree that Congress intended that violations of different parts of §2113(a), (b) and (d) would constitute only one crime. More important, the plain terms of the statute itself compel a different conclusion.

The issue is somewhat complicated by the fact that subsection (d) defines as criminal certain acts when [20] done in committing or attempting to commit any offense defined in (a) or (b). It is unanimously held that when one is charged with committing or attempting to commit an offense defined in (a) or (b), and also the aggravating acts defined in (d) in conjunction therewith, only one conviction will stand. *Heflin v. United States*, (5 Cir.), 223 F. 2d 371; *Ward v. United States*, (10 Cir.), 183 F. 2d 270; *Simunov v. United States*, (6 Cir.), 162 F. 2d 314; *Gant v. United States*, (5 Cir.), 161 F. 2d 793; *O'Keith v. United States*, (5 Cir.), 158 F. 2d 591; *Crum v. United States*, (9 Cir.), 151 F. 2d 510; *Miller v. United States*, (2 Cir.), 147 F. 2d 372; *Vautrot v. United States*, (8 Cir.), 144 F. 2d 740; *Hewitt v. United States*, (8 Cir.), 110 F. 2d 1. Cf. *Holiday v. Johnston*, 313 U. S. 342, 61 S. Ct. 1015, 85 L.Ed. 1392. The rationale of these cases is that subsection (d) defines an aggravation of the same offenses as are made criminal in (a) and (b). The same theory has been advanced with regard to subsection (e). *Crum v. United States*, (9 Cir.), 151 F. 2d 510.

The problem usually arises, as it is presented here, when two crimes defined in (a) or (b) are alleged, and it is further alleged that one of them was done in the aggravated manner defined in (d). Obviously, under the authorities just cited, the act made criminal in (a) and (b) which is performed in the aggravated manner described in (d) is merged with the latter offense. Is the other subsection (a) or (b) crime also merged? The answer is unquestionably no. In *Heflin v. United States*, (5 Cir.), 223 F. 2d 371, we reached the opposite conclusion, because the government there conceded the [21] point and agreed to a corresponding modification of Heflin's sentence, but we do not wish that case to stand as authority for the view that in this respect the sentence was illegal. It was illegal in another respect, however, and was properly reversed as to one of the counts in that it committed Heflin for both robbery

as defined in (a) and an aggravation of the same offense under (d).

The appellant here was not sentenced for an offense defined in (a) or (b) and also for the same offense committed in an aggravated manner as defined in (d). He was sentenced for separate violations of (a) and (b), one of those violations having been committed in an aggravated manner. He was, therefore, legally convicted and sentenced for two separate crimes, since the aggravation merges only with the offenses with which it is charged (and there may of course be more than one aggravated offense), and not with all related offenses as well.

The judgment is

Affirmed.

[22] In United States Court of Appeals

No. 15755

OLLIE OTTO PRINCE

versus

UNITED STATES OF AMERICA

JUDGMENT—February 29, 1956

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

[23] Clerk's Certificate to foregoing transcript omitted in printing.

[24] Supreme Court of the United States

[Title omitted]

ORDER GRANTING LEAVE TO PROCEED IN FORMA PAUPERIS AND
PETITION FOR WRIT OF CERTIORARI—June 4, 1956

On petition for writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 997 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

June 4, 1956.



SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1956

No. 132

OLLIE OTTO PRINCE, PETITIONER

vs.

UNITED STATES OF AMERICA

ORDER GRANTING MOTION TO ENLARGE THE RECORD—

November 5, 1956

ON CONSIDERATION of the motion of counsel for petitioner to enlarge the record in this case,

IT IS ORDERED by this Court that the said motion be, and it is hereby, granted.

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF TEXAS

EXCERPTS FROM TRANSCRIPT OF TESTIMONY—Printed pursuant to order of this Court dated November 5, 1956 granting motion to enlarge the record.

Page 3—Testimony of Guy Mann, Direct Examination

Guy Mann is the vice-president of the Malone State Bank at Malone, Texas.

Pages 4 and 5

Q. Do you recognize the defendant in this case, Ollie Otto Prince?

A. Yes, sir.

Q. Did you know him on October 5, 1948, or before that date?

A. No, sir.

Q. Did you see him on the date of October 5, 1948?

A. I did.

Q. Just please tell the jury under what circumstances and how you met him and what happened.

A. Well, I would go to the back end of the bank—we have two vaults; one vault in the front is used for the bank and one in the back for the customer. One of my customers came in and wanted some papers.

Q. What was his name?

A. Willie Geltmeier. He and I went to the rear end of the bank; there are three rooms. We went into the third room and Mr. Geltmeier was ahead of me two or three paces. As he entered the room, Mr. Prince came in the side door. We three formed a kind of a triangle the way we were standing and he asked us where a cotton office was.

Q. Who did?

A. Mr. Prince.

Q. This man over here?

A. Yes. And, my customer stepped over toward him and pointed back—the doors were open, through the other room where you could see across over there at that time. Up until that time I hadn't suspected anything, but after he answered and Mr. Prince failed to move on, then I did suspicion something. * * *

A. I turned to go back to the front of the bank and after I got to the first door, Mr. Prince met me with a gun in my side. I pulled through the door and he caught me right astride of the door facing.

Page 7

Q. Was it light in the bank when this occurred?

A. Yes.

Q. Do you remember what time of day it was?

A. Just guessing at it, I would say he contacted me somewhere around 11:40, not later than 11:45.

Q. In the morning of October 5, 1948?

A. That's right.

Q. Were there any lights on in the bank?

A. Yes.

Page 10—Cross-Examination

Q. You say the man that robbed you came in from that side street?

A. Yes.

Page 13

Q. How long intervention was it from the time you saw him come into the bank until the robbery was completed and he left?

A. Oh, I would say—this is a guess—I would say ten minutes.

Page 16

Q. No other customer came into the bank for ten minutes?

A. Yes, that's right.

Q. That was the very middle of cotton-picking season on October 5?

A. Yes.

Q. And, you have a lot of customers in there during the cotton-picking time?

A. Yes.

Q. There were a lot of people on the street in Malone?

A. Yes, a good many people.

Page 24—Testimony of Francis Kaddatz—Cross-Examination

Q. You didn't see which door he came in?

A. No, sir, but he would have to go to the back because I would have seen him if he went through the front.

Q. The front door was not locked?

A. No.

Q. What time of day did you say it was?

A. Right before noon; it was exactly ten minutes before twelve; when he walked into the bank, I looked at my watch.

Page 32—Testimony of Willie Geltmeier—Direct Examination

Q. On or about October 5, 1948, did you have occasion to be in the Malone State Bank?

A. I went in there on some business.

Q. Do you know about what time of day you went in there?

A. Shortly before noon.

Q. About how long were you in there on that occasion?

A. Oh, I would say about ten minutes or twelve.

Q. Did the bank get robbed while you were in there?

A. Yes.

Page 33

Q. Tell the jury, please, and the Court, concerning the bank robbery from the time somebody entered the bank until they left.

A. I went in on some business and walked to the bank to get some papers. I seen somebody looking through the glass into the bank and he came in the back door and he asked me if that was a cotton office and I told him it was across the street. Lewis Linz runs the cotton office. He made an attempt to get out, but he didn't; he stopped at the back door. At that time Mr. Mann came to the back and he stopped him and went in the bank.

Q. What did he do?

A. He asked Mr. Mann if he had any money, and Mr. Mann said that he didn't. He said, "I want it."

Q. Then what did he do?

A. He pulled a gun on us and marched us to the vault. Mr. Mann got him some money there.

PETITION NOT PRINTED

OCT 31 1956

JOHN T. FEY, CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 132

OLLIE OTTO PRINCE,

Petitioner,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF PETITIONER

JOSEPH COHEN,
CHARLES S. SCHNIDER,
JOSEPH P. JENKINS,
711 Huron Building,
Kansas City, Kansas,
Counsel for Petitioner.

PETITION NOT PRINTED

INDEX

SUBJECT INDEX

	Page
Brief of Petitioner	1
Opinion of Court Below	1
Jurisdiction	1
Questions Presented for Review	5
Statement of the Case	5
Summary of Argument	8
Point A. The recommendations of the Attorney General, the Senate and House reports, the debate thereon, and a fair reading of the statute commonly known as the Bank Robbery Act, as amended, and the reenactment thereof, are strongly indicative of Congressional intent to include the crime of burglary in the 1937 amendment to the statute (Act of August 24, 1937, Ch. 747, 50 Stat. 749) which added the offense of entering a bank building with intent to commit a felony or larceny therein. Mere entry, not under burglarious circumstances, or in any manner evidencing a breaking or entering, as in the case at bar, is not a crime intended to be punished under the amendment, so as to empower the trial court to impose a separate sentence thereon....	10
Point B. The entrance with intent amendment, seemingly selective because of its legislative history, appears to limit its application	

to burglary, however, because of its phraseology, has been interpreted to cover the situation when one entering a bank building with intent to rob by force or violence, or to steal from the bank, but after such entry either abandons his purpose, or is apprehended before he can consummate the unlawful enterprise. However, if the felon consummates the intent and commits the intended act made criminal by the statute, he can only be punished for the consummated act. The intent count is deemed merged into the count charging the contemplated act.

20

Point C. Congress, prior to the 1937 amendment, provided for a maximum sentence of twenty-five (25) years for the acts prohibited in 12 U.S.C. 588b (a) and (b), the predecessor statute. The amendment was not intended to provide for a more severe sentence for the crime of bank robbery, but to expand its scope so as to include burglary and larceny; burglary being construed to include entry not under the usual burglarious circumstances, i.e., breaking and entering. When the entry with intent consummates in the actual robbery by force and violence, or in robbery under aggravated circumstances, as in the case at bar, and prohibited in subsection (a) and (b) of the original act and

subsections (a) and (d) of the reenactment, the intent count of the indictment is merged therein, Congress not being deemed to have manifested an intention to provide more than twenty-five (25) years punishment as the maximum imposable under these subsections. In the case at bar, Count Two of the indictment, the entry with intent count, merged in Count One thereof, the aggravated circumstances count, so as to empower the court to impose a maximum sentence of twenty-five (25) years only on the indictment . . .

Point D. Whether or not it is deemed that Congress did not intend the 1937 amendment containing the entry with intent provision to cover only crimes in the nature of the traditional burglary, i.e., breaking an entering, nevertheless, the court erred in imposing a sentence under each count of the indictment to be served consecutively, in that no sentence should have been imposed on the second count. The robbery of the bank did not constitute two separate crimes for the purpose of punishment, the entrance with intent count of the indictment necessarily being merged in the aggravated count, since proof of the robbery under the aggravated circumstances alleged in Count Two of the in-

dictment necessarily included all proof necessary to prove the entry with intent charged in Count Two thereof. Proof of violation of the entry of intent provision of the amendment did not require proof of any additional facts

41

TABLE OF CASES CITED

<i>Alford v. United States</i> , 113 F. 2d 885	21
<i>Barkdoll v. United States</i> , 147 F. 2d 617	26
<i>Benson v. McMahon</i> , 127 U. S. 457	17
<i>Blockburger v. United States</i> , 284 U. S. 299	42
<i>Casebeer v. United States</i> , 87 F. 2d 668	42
<i>Coy v. Johnston</i> , 136 F. 2d 818	26
<i>Crum v. United States</i> , 151 F. 2d 510	26
<i>Dimenza v. United States</i> , 130 F. 2d 465	36
<i>Durrett v. United States</i> , 107 F. 2d 438	27
<i>Gant v. United States</i> , 161 F. 2d 793	26
<i>Gavieres v. United States</i> , 220 U. S. 338	42
<i>Gebhart v. United States</i> , 163 F. 2d 962	26
<i>Greenburg v. United States</i> , 253 F. 728	34
<i>Heflin v. United States</i> , 223 F. 2d 371	26, 30
<i>Hewitt v. United States</i> , 110 F. 2d 1	26
<i>Holiday v. Johnston</i> , 313 U.S. 342	28
<i>Hudspeth v. Melville</i> , 127 F. 2d 373	18, 21
<i>Hudspeth v. Tornello</i> , 128 F. 2d 173	21
<i>Jerome v. United States</i> , 318 U.S. 101	20, 40
<i>Madigan v. Wells</i> , 224 F. 2d 577	32
<i>McDonald v. Johnson</i> , 149 F. 2d 768	26
<i>McDonald v. Moinet</i> , 139 F. 2d 939	26
<i>O'Keith v. United States</i> , 158 F. 2d 591	26
<i>Price v. United States</i> , 193 F. 2d 523	26, 29
<i>Prince v. United States</i> , 230 F. 2d 568	28
<i>Puerto Rico v. Shell Company</i> , 302 U. S. 253	18
<i>Rawls v. United States</i> , 162 F. 2d 798	21
<i>Simunov v. United States</i> , 162 F. 2d 314	26, 29
<i>United States v. Carpenter</i> , 143 F. 2d 47	34
<i>United States v. Jerome</i> , 130 F. 2d 514	18, 20

INDEX

v

	Page
<i>United States v. Reece</i> , 92 U.S. 214	18
<i>United States v. Wiltberger</i> , 5 Wheat 76	18
<i>Vautrot v. United States</i> , 144 F. 2d 740	26
<i>Ward v. United States</i> , 183 F. 2d 270	26
<i>Wells v. Swope</i> , 121 F. Supp. 718	32
<i>Wells v. United States</i> , 124 F. 2d 334	27
<i>Wells v. United States</i> , 210 F. 2d 112	28
<i>Wilson v. United States</i> , 145 F. 2d 734	26

TABLE OF STATUTES CITED

Act of Congress, May 18, 1934, Ch. 304; 48 Stat. 783	10
Act of Congress, June 25, 1948, Ch. 645; 62 Stat. 796	10
Act of Congress, August 24, 1937, Ch. 747; 50 Stat. 749	11
18 U.S.C. Sec. 659 and 2117	34

TEXTBOOK CITED

<i>Black's Law Dictionary</i> , page 259	17
--	----

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 132

OLLIE OTTO PRINCE,

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Petitioner,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF PETITIONER

I

Official Report of Opinion Below

The opinion of the United States Court of Appeals for the Fifth Circuit in this case is reported in 230 F. 2d 568. The opinion is printed in full in the record (R. 8).

II

Jurisdiction

Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

III

Statutes Involved

12 U.S.C. Sec. 588b (1946 Ed. Vol. 1, p. 1063:

(a) "Whoever, *by force and violence*, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank; or whoever shall enter or attempt to enter any bank, or any building used in whole or in part as a bank, with intent to commit in such bank or building, or part thereof, so used, any felony or larceny, shall be fined not more than \$5,000 or imprisoned not more than twenty years, or both; or whoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value exceeding \$50 belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than \$5,000 or imprisoned not more than ten years, or both; or whoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value not exceeding \$50 belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than \$1,000 or imprisoned not more than one year, or both."

(b) "Whoever, in committing, or in attempting to commit, any offense defined in subsection (a) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not less than \$1,000 or more than \$10,000 or imprisoned not less than five years nor more than twenty-five years, or both."

(c) "Whoever shall receive, possess, conceal, store, barter, sell, or dispose of any property or money or other thing of value, knowing the same to have been taken from a bank in violation of subsection (a) of this section shall be fined not more than \$5,000 or imprisoned not more than ten years, or both."

18 U.S.C. Sec. 2113 (1952 Ed. Vol. 2, pp. 2466-2467):

(a) "Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association; or

"Whoever enters or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part as a bank, or as a savings and loan association, with intent to commit in such bank, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny—

"Shall be fined not more than \$5,000 or imprisoned not more than twenty years, or both."

(b) "Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding \$100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than \$5,000 or imprisoned not more than ten years, or both; or

"Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding \$100 belonging to, or in the

care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than \$1,000 or imprisoned not more than one year, or both."

(c) "Whoever receives, possesses, conceals, stores, barter, sells, or disposes of, any property or money or other thing of value knowing the same to have been taken from a bank, or a savings and loan association, in violation of subsection (b) of this section shall be subject to the punishment provided by said subsection (b) for the taker."

(d) "Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than \$10,000 or imprisoned not more than twenty-five years or both."

(e) "Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or punished by death if the verdict of the jury shall so direct."

(f) "As used in this section the term 'bank' means any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States, and any bank the deposits of which are insured by the Federal Deposit Insurance Corporation."

(g) "As used in this section the term 'savings and

loan association' means any Federal savings and loan association and any savings and loan association the accounts of which are insured by the Federal Savings and Loan Insurance Corporation."

IV

Questions Presented for Review

1. Did the United States District Court for the Western District of Texas err in sentencing petitioner to consecutive sentences of twenty (20) years and fifteen (15) years on the two counts of the indictment herein involved?

2. Did said District Court err in refusing to vacate, expunge and set aside the Fifteen (15) year sentence imposed on Count Two of said indictment?

3. Did the United States Court of Appeals for the Fifth Circuit err in affirming the judgment of the trial court overruling petitioner's Motion to Modify or Correct Illegal Sentence?

4. What is the maximum sentence imposable under the indictment involved herein?

5. When Congress passed the 1937 amendment to the Bank Robbery Act, did it intend to widen the scope of the Act to encompass peaceable entry of a bank building with intent to commit a felony or larceny therein?

V

Statement of the Case

The question presented for review in this case is whether the trial court erred in overruling petitioner's Motion to Vacate or Correct Illegal Sentence. The precise question is whether the trial court had the power to impose upon the petitioner a sentence of imprisonment for a term of twenty (20) years on the first count of the indictment charg-

ing commission of the crime of bank robbery under aggravated circumstances, and in addition thereto, to fifteen (15) years on the second count of said indictment charging entering a bank with intent to commit a felony therein, the second sentence to be served upon the expiration of the first, or an aggregate sentence of thirty-five (35) years.

In March, 1949, the Federal Grand Jury, meeting at San Antonio, Texas, indicted petitioner. The indictment was in two counts as follows:

"The grand jury charges: On or about October 5, 1948, in Hill County, Texas, within the Waco Division of said District, OLLIE OTTO PRINCE, by intimidating Guy Mann, feloniously took from the presence of the said Guy Mann Fifteen Thousand Seven Hundred Sixty-four (\$15,764.00) Dollars in money, which said money then belonged to the Malone State Bank of Malone, Texas, and which said bank was then a banking association incorporated under the laws of the State of Texas, and was then an insured bank within the meaning of the provisions of Section 264, Title 12, United States Code, relating to Federal Deposit Insurance Corporations, and in committing the offense above described, the said OLLIE OTTO PRINCE put the life of Guy Mann in jeopardy by use of a dangerous weapon, to-wit: a pistol."

SECOND COUNT

"At the time and place and within the jurisdiction, all as described in the First Count hereof, OLLIE OTTO PRINCE entered the bank described in said First Count, with intent to commit therein a felony, to-wit: a robbery."

(R. 1)

The first count charged violation of 18 U.S.C. Sec. 2113 (d). The second count charged violation of 18 U.S.C. Sec. 2113 (a).

Trial was had and a verdict returned by the jury on November 22, 1949, finding petitioner guilty of both counts. On said date he was sentenced by the trial court to twenty (20) years on the first count and fifteen (15) years on the second count of said indictment, the fifteen (15) year sentence to begin upon the expiration of the sentence imposed on the first count.

On June 24, 1955, petitioner filed his Motion to Vacate or Correct Illegal Sentence in the sentencing court, the United States District Court for the Western District of Texas, contending that the sentence was imposed in violation of the Constitution and laws of the United States; that the trial court was without jurisdiction to impose the sentence; and that the sentence was in excess of the maximum allowed by law in that 18 U.S.C. Sec. 211 provides a maximum punishment of twenty-five (25) years for the offense for which this petitioner was convicted, whereas petitioner was sentenced on two counts of twenty (20) years and fifteen (15) years, respectively, to run consecutively, or for a total of thirty-five (35) years (R. 5).

On the 27th day of July, 1955, the trial court entered an order overruling the motion (R. 6).

On August 4, 1955, petitioner filed his notice of appeal to the United States Circuit Court of Appeals for the Fifth Circuit (R. 6). On February 29, 1956, the order of the trial court was affirmed (R. 8).

A petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit was thereafter filed with this Court. Certiorari was granted on June 4, 1956.

VI

Summary of Argument**POINT A**

The recommendations of the Attorney General, the Senate and House reports, the debate thereon, and a fair reading of the statute commonly known as the Bank Robbery Act, as amended, and the reenactment thereof, are strongly indicative of Congressional intent to include the crime of burglary in the 1937 amendment to the statute (Act of August 24, 1937, Ch. 747, 50 Stat. 749) which added the offense of entering a bank building with intent to commit a felony or larceny therein. Mere entry, not under burglarious circumstances, or in any manner evidencing a breaking or entering, as in the case at bar, is not a crime intended to be punished under the amendment, so as to empower the trial court to impose a separate sentence thereon.

POINT B

The entrance with intent amendment, seemingly selective because of its legislative history, appears to limit its application to burglary, however, because of its phraseology, has been interpreted to cover the situation when one entering a bank building with intent to rob by force or violence, or to steal from the bank, but after such entry either abandons his purpose, or is apprehended before he can consummate the unlawful enterprise. However, if the felon consummates the intent and commits the intended act made criminal by the statute, he can only be punished for the consummated act. The intent count is deemed merged into the count charging the completed act.

POINT C

Congress, prior to the 1937 amendment, provided for a maximum sentence of twenty-five (25) years for the acts prohibited in 12 U.S.C. 588b (a) and (b), the predecessor statute. The amendment was not intended to provide for a more severe sentence for the crime of bank robbery, but to expand its scope so as to include burglary and larceny; burglary being construed to include entry not under the usual burglarious circumstances, i.e., breaking and entering. When the entry with intent consummates in the actual robbery by force and violence, or in robbery under aggravated circumstances, as in the case at bar, and prohibited in subsection (a) and (b) of the original act and subsections (a) and (d) of the reenactment, the intent count of the indictment is merged therein, Congress not being deemed to have manifested an intention to provide more than twenty-five (25) years punishment as the maximum imposable under these subsections. In the case at bar, Count Two of the indictment, the entry with intent count, merged in Count One thereof, the aggravated circumstances count, so as to empower the court to impose a maximum sentence of twenty-five (25) years only on the indictment.

POINT D

Whether or not it is deemed that Congress did not intend the 1937 amendment containing the entry with intent provision to cover only crimes in the nature of the traditional burglary, i.e., breaking and entering, nevertheless, the court erred in imposing a sentence under each count of the indictment to be served consecutively, in that no sentence should have been imposed on the second count. The robbery of the bank did not constitute two separate crimes for the purpose of punishment, the entrance with intent count of the

indictment necessarily being merged in the aggravated count, since proof of the robbery under the aggravated circumstances alleged in Count One of the indictment necessarily included all proof necessary to prove the entry with intent charged in Count Two thereof. Proof of violation of the entry of intent provision of the amendment did not require proof of any additional facts.

VII

Argument

POINT A

The Congress, in enacting the 1937 amendment to the Bank Robbery Act, which included the entry of a bank or savings and loan association with intent to commit a felony or larceny, intended this offense to be in the nature of a burglary. Mere entry, not under burglarious circumstances, or in any manner evidencing a breaking or entering, is not a separate and distinct crime from actual consummation of the typical bank robbery, or bank larceny, as in the case at bar, so as to empower the trial court to impose a separate sentence thereon.

This case involves interpretation of the federal statute commonly called the Bank Robbery Act, 18 Y.S.C. Sec. 2113. It will be noted that petitioner has also set out the text of 12 U.S.C. Sec. 588b, also known as the Bank Robbery Act, now repealed.

The latter statute was enacted in 1934, Act of May 18, 1934, Ch. 304, 48 Stat. 783; the former in 1948, Act of June 25, 1948, Ch. 645 62 Stat. 796. The 1948 statute is substantially a reenactment of the former statute, consolidating and slightly modifying the earlier act. As the Court of Appeals pointed out in its opinion below, nothing in the reenactment affects the questions involved in this case (R.

9). House Report 304 of the Eightieth Congress, page A-135, also supports this view.

The offense charged in the second count of the indictment was not made a crime by the Act of 1934 which originally established the federal offense of bank robbery. The provision making entry of a bank with intent to commit a felony therein a crime was added by the Act of August 24, 1937, Ch. 747, 50 Stat. 749. The added provision became part of subsection (a) of the earlier statute and also part of subsection (a) of the reenactment. The language of the latter statute is substantially the same as that of the original amendment.

The question posed is: Did the Congress, when it passed the amendment to the earlier statute, now embodied in the later statute, intend to make mere entry *per se* of a bank, as part of a plan to commit armed robbery therein, a single and separate offense so that the crime of bank robbery, in effect, is divided into two separate stages, permitting a separate sentence on each phase of the offense?

Stated in a different manner, suppose a person walks into a bank with intent to rob it, and uses a dangerous weapon while he is engaged in the unlawful entry, robs the bank, but is apprehended before he makes his escape! Has he committed one crime or two? Is the entry of a bank a separate and distinct crime from the actual bank robbery, or is it part of the same transaction and not a crime in itself under the circumstances? Did the Congress intend separate punishment for these acts so that a person committing them can be sentenced to a total of twenty (20) years for each act if not committed under aggravated circumstances, or a maximum of twenty-five (25) years for each act if committed under aggravated circumstances as set out in subsection (d) of the reenactment and subsection (b) of the original statute? Or did the Congress intend

the entry with intent amendment to cover offenses other than walking into a bank intending to commit a felony therein and consummating the intent?

The last question particularly must be answered in the affirmative when the legislative history of the amendment is examined.

Under the facts of the case at bar, the petitioner entered the Malone State Bank, Malone, Texas, just before noon on the 5th day of October, 1948, and during its regular banking hours. He came in through the bank's side entrance, asked certain directions, and then displayed a revolver and consummated the act of bank robbery under the aggravated circumstances charged in Count One of the indictment. (Supp. Rec.) Petitioner is now serving the twenty (20) year sentence imposed on that count.

However, when the history and purpose of the amendment is considered, can it be said that he had already consummated one crime, that set out in Count Two of the indictment, when he made his entrance into the bank so as to justify the imposition of an additional fifteen (15) year sentence to be served upon the expiration of that sentence imposed in Count One? Petitioner earnestly submits that a negative answer must be given to this query.

The Attorney General of the United States sent the following letter, dated March 17, 1937, to the Honorable William B. Bankhead, Speaker of the House of Representatives:

OFFICE OF THE ATTORNEY GENERAL
Washington, D. C., March 17, 1937.

Hon. William B. Bankhead,

The Speaker, House of Representatives, Washington, D. C.

My Dear Mr. Speaker: The act of May 18, 1934 (48 Stat. 783; U.S.C., title 12, secs. 588a to 588d), penalizes robbery of a national bank or a member bank of the

Federal Reserve System. The class of banks protected by this statute was enlarged by section 333 of the act of August 23, 1935 (49 Stat. 720), to include all banks insured by the Federal Deposit Insurance Corporation.

The fact that the statute is limited to robbery and does not include larceny and burglary has led to some incongruous results. A striking instance arose a short time ago, when a man was arrested in a national bank while walking out of the building with \$11,000 of the bank's funds on his person. He had managed to gain possession of the money during a momentary absence of one of the employees, without displaying any force or violence and without putting any one in fear—necessary elements of the crime of robbery—and was about to leave the bank when apprehended. As a result, it was not practicable to prosecute him under any Federal statute.

The enclosed bill which has been drafted in this Department proposes to amend subsection (a) of section 2 of the above-mentioned statute so as to include within its prohibitions, the crimes of burglary and larceny of a bank covered by its provisions.

I am informed by the Acting Director of the Bureau of the Budget that this legislation is not in conflict with the program of the President and I recommend its enactment.

Sincerely yours,

HOMER S. CUMMINGS,
Attorney General.

H. R. 732, 75th Congress, 1st Session.

The law existing at the time was set out in the report, page 2, with the proposed amended portions printed in italics:

“(a) Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank; *or whoever shall enter or attempt to enter any bank, or any building used in whole or in part as a bank, with intent to commit in such bank or building, or part thereof, so used, any felony or larceny; or whoever shall take or carry away, with intent to steal or purloin, any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of any bank,* shall be fined not more than \$5,000 or imprisoned not more than twenty years, or both.”

It will be noted that the recommended words “or whoever shall enter or attempt to enter any bank, or any building, used in whole or in part as a bank, with intent to commit in such bank or building, or part thereof, so used, any felony or larceny;” were embodied in and made a part of the amendment that was finally passed. The other recommended language was adopted in substantially the form recommended by the Attorney General. Since the Attorney General points out that the original act did not include larceny and burglary, a fair reading of the amendment clearly indicates that the first portion is directed at the crime of burglary and the second portion at the crime of larceny. A vivid and somewhat bizarre example of the law’s lack of all-inclusiveness, in so far as larceny is concerned, being given in the letter.

The caption of the report, submitted by the Committee on the Judiciary, is as follows:

**"AMEND THE BANK-ROBBERY STATUTE TO
INCLUDE BURGLARY AND LARCENY"**

The Committee reported the bill (H.R. 5900) favorably and concurred with the Attorney General's recommendations. In the body of this report, page 1, the following is found:

"The Attorney General has recommended the enactment of this proposed legislation which is designed to enlarge the scope of the bank robbery statute, enacted in 1934, (48 Stat. 783; U.S.C., title 12, sec. 588b) to include larceny and burglary of the banks protected by this statute. * * * Your committee concurs in this recommendation."

The following debate is reported in the *Congressional Record*, House, Vol. 81, May 17, 1937, at page 4656:

AMENDMENT OF BANK ROBBERY STATUTE

The Clerk called the next bill, H. R. 5900, to amend the bank-robbery statute to include burglary and larceny.

The SPEAKER. Is there objection to the present consideration of the bill?

Mr. WOLCOTT. Mr. Speaker, reserving the right to object, in reading the bill it seems to me this puts simple larceny on the same plane as robbery and breaking and entering in an attempt to commit larceny. It seems to me a distinction should be made between simple larceny within the building and robbery.

Mr. RANKIN. Will the gentleman yield?

Mr. WOLCOTT. I yield to the gentleman from Mississippi.

Mr. RANKIN. How are you going to tell what a thief is going to do when he gets into a bank? If a man breaks into a house or bank he will kill anyone in it to carry out his purpose.

Mr. WOLCOTT. If the gentleman will read the bill and report, he will see that it not only punishes for robbery which is putting in fear, and *breaking and entering* (emphasis mine), but the larceny of anything within the bank, whether the man is there lawfully or not. If a man should go into a bank to make a deposit and pick up a pencil and walk out with it he would be on the same plane, according to this bill, as a man who deliberately broke in during the night-time and committed larceny. I know the gentleman does not agree with that.

Mr. RANKIN. I do not, but if a man breaks into a house he is going to commit a crime.

Mr. WOLCOTT. There is no question about that. *Breaking and entering is a crime in and of itself.* (emphasis mine)

Mr. Speaker, I ask unanimous consent that this bill may be passed over without prejudice.

The SPEAKER. Is there objection to the request of the gentleman from Michigan (Mr. Wolcott)?

There was no objection.

In Vol. 81, page 5376, of the *Congressional Record*, House, for June 7, 1937, the bill again is referred to as " * * H. R. 5900, to Amend the Bank-Robbery Statute to Include Burglary and Larceny."

The Senate Committee on the Judiciary recommended the bill be passed as recommended by the Attorney General in S. R. 1259, Seventy-fifth Congress, First Session. On page 1 thereof the letter from the Attorney General, here-

tofore mentioned, was set out in full, as is the House Report numbered 732, both of which refer to the amendment as enlarging the scope of the Bank Robbery Statute to include larceny and burglary.

The legislative intent is clear that simple larceny was to be brought within the purview of the statute, as well as burglary.

In the 81 Cong. Rec. excerpt, *supra*, it will be noted that Mr. Wolcott refers to *breaking and entering* no less than three times. Mr. Rankin makes similar observations. There seems no question that they were debating the entry with intent provision on the premise that it was designed to enlarge the scope of the Act to cover burglaries in the traditional meaning of the crime. Read in conjunction with the letter of the Attorney General and the proposed amendment which he submitted, and which contained the same words embodied in the amendment as passed with the exception of the word, "depredation", for which the word, "felony" was substituted, and the House and Senate reports which concurred in the Attorney General's recommendations, little doubt remains of the Congressional intent—to add the crime of burglary in its generally understood meaning to the Act.

Burglary has been defined as breaking and entering the house of another in the nighttime, with intent to commit a felony therein, whether the felony is actually committed or not. Black's *Law Dictionary*, page 259, *Benson vs. McMahon*, 127 U. S. 457, 8 S. Ct. 1210, 32 L. Ed. 234. The crime has been expanded by legislation to include other buildings, or parts thereof, and daytime break-ins.

Words are to be construed, if reasonably possible, so as to effectuate the purpose and intent of the lawmakers, and the meaning of words in a particular instance is de-

terminated, not only by a consideration of the words themselves, but by also considering the purpose of the law and the circumstances under which they are employed. *Puerto Rico vs. Shell Company*, 302 U. S. 253, 258, 58 S. Ct. 167, 82 L. Ed. 235; *Hudspeth vs. Melville*, 127 F. 2d 373, 377 (C.A. 10).

Furthermore, without exception, it is held that a penal statute must be strictly construed. *United States vs. Reece*, 92 U.S. 214, 219, 23 L. Ed. 563; *United States vs. Wiltberger*, 5 Wheat 76, 85, 5 L. Ed. 37. As Justice Huxman observed in the *Melville* case:

"Nothing is a crime unless specifically made so by statute. Crimes do not arise by implication. This is a cardinal principle of our system of jurisprudence—an inviolate safeguard that we have thrown around the individual to protect his life, liberty and freedom."

Further, as Justice Frank points out in *United States vs. Jerome*, 130 F. 2d 514 (C.A. 2), this is a penal statute, and should not, by construction, be generously construed in favor of the Government.

Another persuasive factor is the heavy penalty, to-wit: twenty (20) years, provided as the maximum assessable under the entry provision. Burglary is traditionally a serious crime, and the penalty is in harmony with this tradition. However, it is inconceivable that if a man enters a bank intending to commit petit larceny, which carries a penalty of not more than one (1) year, he can be sentenced to twenty (20) years if he abandons his purpose after entry, or if no merger was had, to a total maximum sentence aggregating twenty-one (21) years if the overt acts of attempt or actual larceny are proved. Carrying this argument further, grand larceny may involve hundreds of thousands of dollars. The maximum penalty is ten (10) years.

Is entry with intent deemed a more serious crime: It does not appear so unless it is deemed to be in the nature of burglary.

Of further interest is that if peaceable entry with intent is intended, a person may enter the bank to commit petit larceny, which is the obvious meaning of the term in the amendment, since grand larceny must necessarily be embraced within the meaning of the term "felony". He thus may be committed for a felony because he entered with intent to commit a misdemeanor.

Since the reenactment, for all practical purposes, is a duplication of the original amendment, the intent of the Congress must be reflected in any judicial interpretation of same. There is nothing in the legislative history of the reenactment indicating the slightest intent to deviate from the clear purpose of the 1937 amendment as reflected in the above letter, recommendations, submitted bill, debates, and Senate and House reports hereinabove set out.

Petitioner did not commit the crime of burglary. Judicial legislation must not charge him with an offense of which he is innocent. Count Two of the indictment should be set aside as void.

POINT B

The 1937 amendment was designed and intended to include larceny and burglary of the banks protected by the Act. The inference is strong from the legislative history of the Act that Congress intended to expand its purview to include both larceny and burglary. The proceedings and reports do not make any attempt to broaden the scope of the Act beyond the above additions. However, it is recognized that the entry with intent provision contains phraseology not particularly conducive to a narrow interpretation of the acts prohibited by it so that breaking and entering with felonious intent, the traditional concept of the act of burglary, excludes peaceable entrance with intent to commit a felony or larceny within the bank building.

As Justice Frank observed in his dissenting opinion in *United States vs. Jerome*, 130 F. 2d 514 (C.A. 2), later reversed in *Jerome vs. United States*, 318 U. S. 101, 63 S. Ct. 483, 87 L. Ed. 640:

“The second change made it a federal crime to enter or attempt to enter a bank with intent to commit such a federal felony or federal larceny. And such an entry was constituted a federal crime whether peaceably made or by breaking in; it thus includes burglary of a bank, i.e., breaking and entering with a felonious intent.”

Congress adopted the language:

“Whoever enters * * * with intent to commit * * * any felony or larceny, * * *”

It can be and has been interpreted to indicate an intent to expand the scope of the Act beyond the usual burglary concept in order to make criminal peaceable entry with intent.

See also dissenting opinions by Justice Huxman in *Hudspeth vs. Melville*, 127 F. 2d 373 (C.A. 10); *Hudspeth vs. Tornello*, 128 F. 2d 173 (C.A. 10). It is pointed out that Justice Frank, in his own dissenting opinion in the *Jerome* case, refers to the opinions of Justice Huxman in the *Melville* and *Tornello* cases and observes that he, in general, is in agreement with them. The position adopted by Justices Frank and Huxman were sustained by this court in *Jerome vs. United States*, *supra*. Although a different point was involved in these cases, namely, whether or not the word "felony" and the entry with intent provision was intended to include state felonies or only those felonies prohibited by the Act, it was deemed necessary by the courts in these cases to trace the history of the Bank Robbery Act and define its purposes. The conclusion was reached that the amendment was intended to cover not only the breaking and entering concept of burglary, but entry not involving force or overt act. As the Court of Appeals for the Tenth Circuit stated in *Rawls vs. United States*, 162 F. 2d 798, on page 799:

"Such subsection, as amended, creates and defines four separate and distinct offenses, the first is an offense in the nature of robbery. The second is an offense in the nature of burglary, entry of a bank with intent to commit a felony or larceny therein, except that forcible entry is not made an element. The third and fourth are offenses in the nature of grand and petit larceny."

See also *Alford vs. United States*, 113 F. 2d 885 (C.A. 10).

The opinion of these courts and the legislative history of the amendment are strong evidence of whether the entry with intent provision, which may have a purpose wider in

scope than the traditional concept of burglary, was designed to add an additional feature to the Act so as to enable a more severe punishment to be imposed for violations, or whether it was enacted to broaden the scope of the Act to include offenses not then within its purview and thus seriously hampering its enforcement by law officers. It is submitted that there is little doubt that effectuating the latter purpose was the moving force behind the enactment.

The Attorney General in his letter to the Speaker of the House, *supra*, pointed out the necessity of amending the Act and cited an instance where a man had walked out of a bank with a large sum of money obtained under larcenous circumstances only, and not covered by the original Act. The Act at the time provided only for the offense of robbery by force and violence, aggravated or not aggravated. He desired widening the scope of the Act to include other offenses which may arise affecting banks. Nowhere in the legislative history is there a hint or scintilla of evidence that he or Congress was dissatisfied with the penalties already assessable thereunder, which were twenty (20) years for robbery by force and violence, and twenty-five (25) years if committed under aggravated circumstances. The Attorney General wanted assurance that there would be no reoccurrence of the striking example described in his letter.

Congress heeded his request. Justice Frank in the *Jerome* case sums it up as follows:

“The legislative history shows that the congressional purpose in adopting these 1937 amendments was to add, to the existing federal crime of bank robbery, (a) the federal crimes of felonious stealing from and petit larceny from a bank; (b) the federal crime of burglary of a bank; and (c) the federal crime of peace-

ably entering a bank with the intent thus to steal bank property."

It is submitted that Congress did not intend to add additional punishment to the Act by these amendments. As Justice Huxman observed in *United States vs. Melville*, supra, and urged by petitioner in the court below, the entry of intent count supplies the omission in the following instance: Suppose one enters a bank with the intent to rob by force or violence or to steal from the bank, but after entrance abandons such intent, or is apprehended before he commits the actual robbery or theft without any overt act that can be classified as an attempt. Congress is deemed to have intended that these acts be punished, but if the man consummated his intent and committed the intended act, would not the imposition of sentence on the consummated act, namely, bank robbery or theft, be what Congress intended, or would the trial judge be empowered to impose two separate sentences?

In view of what has been stated, it is urged that neither Congress nor the Attorney General were concerned over the status of this fact structure. The Act amply provided for punishment under subsections (a) and (b) of the original act, and still provides the same punishment under subsections (a) and (d) of the reenactment. No pyramiding or aggregating of sentences was contemplated or intended. The entry merged in the consummated act so as to empower the court to impose one sentence.

Petitioner is acutely aware of the fact that the crime of burglary *per se* does not necessarily merge into the culminated act. As pointed out in *United States vs. Jerome*, supra, in a footnote on page 524:

"In a sense, the crime of burglary is itself a crime, which consists of an attempt to perform another crime;

for burglary is breaking and entering with the intent to do an unlawful act and is punishable whether or not that other act is performed.”

Petitioner’s research has failed to disclose any cases where an indictment involving federal bank robbery contained a count charging burglary in the traditional style. There appears to be no precedent.

However, in the case at bar, the elements of the crime of burglary are conspicuously absent since the petitioner walked in a regular entrance during regular banking hours, performed the prohibited acts under aggravated circumstances, and then left. (Supp. Rec.) He is liable to a maximum sentence of twenty-five (25) years.

There is a vast difference between peaceable entry and that perpetrated under burglarious circumstances. This distinction was noted in *United States vs. Jerome*, supra. It is inconceivable that if Congress wanted to cover peaceable entry with intent so that perpetrator thereof would not escape punishment, it further intended that peaceable entry carry an additional sentence if the entry culminates in the offense intended.

If this Court approves the practice of pleading a count charging entry with intent in addition to a count charging the consummated intended act, an indispensable weapon has been given the alert and astute prosecutor in that he can be assured of two sentences for the typical bank robbery, as in the case at bar. Every indictment charging bank robbery by force and violence, aggravated or not aggravated, if it is properly drawn, will, by judicial fiat, contain a minimum of two counts—and thus subject the defendant to an automatic imposition of two sentences. In practically all of the cases cited herein and arising under the Bank Robbery Act, the defendant would be eligible for the additional sentence.

This is the dilemma of petitioner. It is submitted that the entry of intent count numbered two, under the peaceable circumstances of this case, was merged into count one, charging bank robbery under aggravated circumstances, so that sentence is permissible under the latter count only.

POINT C

Congress, prior to the amendment, provided for a maximum sentence of twenty-five (25) years for the acts prohibited in 12 U.S.C. 588b (a) and (b), the predecessor statute. The amendment was not intended to provide for more severe punishment for the commission of a typical bank robbery, but to expand its scope to include burglary and larceny, burglary being deemed to include peaceable entry with intent to commit a felony or larceny. The reenactment must be interpreted in the light of such Congressional intent, and in view of its purposes as evidenced by the earlier statute. If the aggravated portion of the reenactment is charged, the lesser crimes charged in subsections (a) and (b), particularly subsection (a), are merged therein so that a maximum sentence of twenty-five (25) years only is imposable.

Subsections (a) and (b) of the earlier statute provided in substance certain punishment for robbing a bank by force and violence or putting in fear, and provided for a heavier punishment, referred to as the aggravated or jeopardy portion of the statute, if the robbery is accomplished or attempted with the use of a dangerous weapon or device. The entry of intent offense was part of subsection (a). The reenactment provides for bank robbery by force and violence or putting in fear and entry with intent in subsection (a) thereof, and the aggravated or jeopardy portion thereof is found in subsection (d).

The courts have interpreted these provisions to mean

that if the crime is committed under aggravated circumstances, an indictment charging bank robbery by force and violence in one count and under aggravated circumstances by the use of a dangerous weapon or device in another count, the first count is deemed to merge in the second count, so that the twenty-five (25) year sentence imposable on that count is the maximum punishment assessable. These courts hold that the Congress did not intend to define two separate offenses, but only one offense, either aggravated or not aggravated.

The courts have displayed definite hostility and aversion to sentence imposed on both subsection (a) and (b) of Sec. 12 U.S.C. 588b, now 12 U.S.C. 2113 (a) and (d). *Ward vs. United States*, 183 F. 2d 270 (C.A. 10); *Gant vs. United States*, 161 F. 2d 793 (C.A. 5); *O'Keith vs. United States*, 158 F. 2d 591; *Vautrot vs. United States*, 144 F. 2d 740; *Barkdoll vs. United States*, 147 F. 2d 617 (C.A. 9); *McDonald vs. Johnson*, 149 F. 2d 768 (C.A. 9); *Crum vs. United States*, 151 F. 2d 510 (C.A. 9); *Hewitt vs. United States*, 110 F. 2d 1 (C.A. 8); *Wilson vs. United States*, 145 F. 2d 734 (C.A. 9); *Gebhart vs. United States*, 163 F. 2d 962 (C.A. 8); *McDonald vs. Moinet*, 139 F. 2d 939 (C.A. 6); *Price vs. United States*, 193 F. 2d 523 (C.A. 6); *Coy vs. Johnston*, 136 F. 2d 818 (C.A. 6); *Heflin vs. United States*, 223 F. 2d 371 (C.A. 5); and *Simunov vs. United States*, 162 F. 2d 314 C.A. 6).

The view of these courts is well expressed in *McDonald vs. Moinet*, supra, wherein it was observed:

"It is true that the original sentence was void, for the reason that the offense of bank robbery by the use of deadly weapons as defined in 12 U.S.C.A. Sec. 588b (b) is the same offense as described in 588b (a) aggravated by the use of a deadly weapon. The Congress not being deemed by the courts to have intended to

define two separate offenses, but only one offense, either aggravated or not aggravated."

The court further states:

"The petition of the government attorney conceded that Walter McDonald could properly be sentenced on only one of the counts of the indictment and that the maximum sentence provided under Title 12, Sec. 588b is twenty-five (25) years."

The language and holdings in these cases are unequivocal and indicate no question as to the premise as to the premise that violation of Sec. 588b (a) and (b), now Sec. 2113 (a) and (d), permits a maximum penalty of twenty-five (25) years only, which would include the entry of intent offense. In these cases the clear intent of the legislature when it enacted the amendment is not being ignored or violated in the least.

However, diligent and possibly over-zealous prosecutors have tried to obtain a separate conviction and sentence on the entry with intent provision as in the case at bar.

The Fifth, Sixth and Ninth circuits have met the question squarely, but without reference to the legislative history of the amendment or its evident purpose, and have arrived at different conclusions, all based on the doctrine of merger.

The Fifth Circuit Court of Appeals, from which this case was appealed, is unequivocally committed to the view that entry with intent is a separate crime, and only one of the progressive stages of a typical bank robbery, and that the court is empowered to impose separate sentences for the crime of bank robbery by force and violence, aggravated or not, and the crime of entry with intent. *Durrett v. United States*, 107 F. 2d 438; *Wells v. United States*, 124

F. 2d 335; *Wells v. United States*, 210 F. 2d 112; *Prince v. United States*, 230 F. 2d 568.

In the *Durrett* case, the Court indicated that if jeopardy was shown, both in entering the bank and in committing the robbery, there would be a merger which would then permit a maximum sentence of twenty-five (25) years, even if robbery by force and violence and entry with intent are separate crimes.

This Court, in *Holiday v. Johnston*, 313 U. S. 342, 61 S. Ct. 1015, had before it the question of whether or not the lower court had followed the correct procedure in setting aside a sentence on both 588b (a) and (b). The lower court elected to set aside the lighter sentence, holding that only one sentence was created by these sections. This Court, in approving the procedure, stated in its opinion that Sec. 588b (a) and (b) did not create separate crimes, but merely prescribed alternate remedies for the same crime. Although this statement appears to be dictum, this case has been cited as authority for the proposition in numerous other cases.

In other words, the crime committed in Sec. 588b (a) is merged in the crime prohibited by Sec. 588b (b). Under this doctrine, a merger could be effected in the case at bar since violation of Sec. 2113 (d), the reenactment of Sec. 588b (b) is charged in addition to one of the offenses defined in subsection (a).

However, the court below adhered to its ruling in the *Durrett* case since no aggravation of the entrance count was charged. Two crimes are recognized as being covered by subsection (a) in both acts, but they can stand together, unless aggravated circumstances are involved. Then either or both appear to be susceptible of merger. See *United States v. Durrett*, *supra*. This position is illogical and con-

fusing because the true purpose of the 1937 amendment has not been clearly understood by the court below.

The Sixth Circuit in *Simunov v. United States*, 162 F. 2d 314, and *Price v. United States*, 193 F. 2d 523, struck down that portion of the sentence imposed on the intent count.

In the *Simunov* case the defendant was convicted under an indictment containing four counts charging defendant with entering a bank to commit a felony (588b (a), 2113 (a)), stealing from the bank (588b (a), 2113 (b)), putting the life of a bank officer in jeopardy (588b (b), 2113 (d)), and attempting to avoid apprehension by forcing a bank official to accompany him without the consent of such official. The trial court sentenced him to sixty-five (65) years plus twenty-five (25) years for kidnapping. The sentence was held to be ambiguous and to require correction. It was observed by the court:

"It is now settled that the statute dealing with the offense of bank robbery creates but a single offense with various degrees of aggravation, permitting sentences of increasing severity * * *. The case is remanded to the district court for the correction of sentence by the imposition of a sentence for not more than 25 years."

In *Price v. United States*, *supra*, also a Sixth Circuit case, decided in 1951, the defendant was originally sentenced on four counts to a total of sixty-five (65) years. One of the counts charged entry with intent. The court, in a *Per Curiam* decision, found this sentence to be clearly erroneous for reasons stated in *Simunov v. United States*, *supra*. The district judge dismissed two counts of the indictment and sentenced defendant to twenty (20) and twenty-five

(25) years respectively on the other two counts to run concurrently. This procedure was approved. The court said:

"It thus appearing that the total punishment imposed did not exceed the permissible limit in one of the counts and it being the evident intention of the re-sentencing judge that the prisoner should serve the *full limit permissible by the statute* (italics mine) obviously appellant has not been prejudiced by the technical error of re-sentencing."

The latest decision prior to that in the case at bar on this point was decided, coincidentally, by the Fifth Circuit from whence this appeal has arisen, in *Heflin v. United States*, 223 F. 2d 371. In this case the defendant was convicted on five counts relating to the robbery of the bank and five sentences were imposed so as to run consecutively for a total of twenty (20) years and two (2) days. Count one charged a violation of 18 U.S.C. Sec. 2113 (a), charging that Heflin feloniously and by force and violence, took from the person and presence of a bank employee a certain sum of money. Count two charged violation of subsection (b) of the statute, taking and carrying away such money with intent to steal. Count three charged violation of subsection (d), taking such money from the person and presence of a bank employee, and in so doing, assaulting certain named persons with a revolver or pistol. Count four charged violation of subsection (c), receiving, concealing, storing and disposing of said money, knowing it to have been taken from a member bank of the Federal Reserve System with intent to steal. Count five charged conspiracy to violate the above sections and the overt act of taking the money.

The court held that subsections (a), (b) and (d) of the statute relating to bank robbery do not create separate offenses, *but only different maximum punishments for a*

single offense, depending upon existence of aggravating circumstances, and therefore only a single sentence should have been imposed under separate counts charging violation of these respective subdivisions, and *that sentence should not have exceeded a \$10,000 fine and twenty-five (25) years imprisonment.*

Clearly, the court was of the opinion that when aggravating circumstances are present, those crimes committed under subsections (a) and (b) of the statute are then merged in that crime prohibited in subsection (d). In the case at bar, entry with intent, a subsection (a) crime, was deemed not to be merged by the court below, contrary to the holdings of the other circuits that have considered this precise question, and its own holding in the *Heflin* case.

In disposing of its decision in the *Heflin* case, decided less than eight months prior to its decision in the case at bar, the court states in its opinion (R. 13):

“The problem usually arises, as it is presented here, when two crimes defined in (a) or (b) are alleged and it is further alleged that one of them was done in the aggravated manner defined in (d). Obviously under the authorities just cited, the act made criminal in (a) and (b), which is performed in the aggravated manner described in (d), is merged with the latter offense. Is the other subsection (a) or (b) crime also merged? The answer is unquestionably no. In *Heflin vs. United States* (5 Cir.), 223 F. 2d 371, we reached the opposite conclusion, because the government there conceded the point and agreed to a corresponding modification of Heflin’s sentence, but we do not wish that case to stand as authority for the view that in this respect the sentence was illegal. It was illegal in another respect, however, and was properly reversed as to one of the counts in that it committed Heflin for both robbery as

defined in (a) and an aggravation of the same offense under (d)."

In the Ninth Circuit in *Wells v. Swope*, 121 F. Supp. 718, reversed on other grounds, *Madigan v. Wells*, 224 F. 2d 277, two district judges ordered the release of Wells on a writ of *habeas corpus* for the reason that the intent count was deemed to be merged in the aggravated count. The Ninth Circuit Court of Appeals in the *Madigan* case, although not clearly delineating its reasons, indicated its acceptance of this view.

The question is thus posed: When an act made criminal by Section 2113 (a) or (b) is committed in the aggravated manner prescribed in (d), is the subsection (a) or (b) crime merged with the latter offense? Under the authorities, as the court below properly points out, the answer is unquestionably yes. And now the crux of the problem: if *two* crimes defined in (a) or (b) are alleged, and it is further alleged that only *one* of the acts is committed in the aggravated form prescribed in (d), does the act alleged to be committed in the non-aggravated form also merge in (d)?

Petitioner respectfully submits that it does.

The authorities have either construed subsections (a) and (b) of the original act, as amended, and subsections (a), (b) and (d) of the reenactment, either as not creating separate offenses, but only as creating different maximum punishments for a single offense, depending upon the existence of aggravating circumstances, or as creating four separate and distinct crimes.

It thus appears that whichever construction is deemed correct, in view of the intent of Congress, and a fair reading of the statute as amended in 1937, the difference is more technical than real in so far as the final results are concerned.

The petitioner deems it of paramount importance that nowhere in the legislative history of the original act, the amendment and the reenactment, is there even a remote hint that Congress intended the maximum punishment for commission of the acts defined in 588b (a) and (b) and 2113 (a), (b) and (d) to be more than twenty-five (25) years.

Prior to the enactment of the 1937 amendment, subsections (a) and (b) of the Bank Robbery Act prohibited the robbery of a bank by force and violence and provided a more severe sentence if the act is committed under aggravated circumstances. Sentences of twenty (20) and twenty-five (25) years respectively were provided, and are still provided in the reenactment.

In 1937, recognizing the need for the recommended legislation embracing certain new federal offenses, that of burglary and larceny, Congress added these two crimes to the Act, distinguishing between grand and petit larceny. It seems clear from the Attorney General's letter, submitted bill, the House and Senate reports, and the brief debates thereon, that Congress did not intend to provide for more severe punishment but merely to enlarge the scope of the act to include those crimes it deemed should be embraced by the statute. It left subsection (b), now subsection (d) in the reenactment, intact, so that if any offense defined in subsection (a) of the old act, or in subsections (a) and (b) of the reenactment, are committed under aggravated circumstances, the heavier sentence is imposable. There is little question that the grand and petit larceny provision of the reenactment can be and are merged in subsection (d) thereof. By the very terms of the statute, one or the other is committed; clearly both offenses cannot be committed at the same time, and there will be a merger with (d) of whichever subsection (b) offense is charged if aggravated circumstances are shown.

The problem concerning the offenses described in (a)

would be equally easy of solution if it is recognized that Congress intended two separate crimes, each susceptible of merger into subsection (d) if committed under aggravated circumstances, but had not intended the defined offenses to represent two phases of the act of bank robbery so that each phase is punishable separately. Subsection (d) of the reenactment in referring to any offense defined in subsections (a) and (b) simply means this: If any of the crimes are committed as prohibited in (a), (b) and (d), the twenty-five (25) year maximum sentence is automatically imposable. There is a merger of the acts into subsection (d). It is inconceivable that Congress intended prosecutors be given the opportunity to amass consecutive sentences by the mere expedient of drafting the indictment so that the typical bank robbery is divided into progressive steps, each portion thereof susceptible to a separate sentence.

While the court below cites 18 U.S.C. Sec. 659 and 2117, and the cases of *Greenburg v. United States*, 253 F. 728 (C.A. 7) and *United States v. Carpenter*, 143 F. 2d 47 (C.A. 7) as authority for the proposition that the various steps of a criminal undertaking may be punished separately, it seems clear that the statute involved in the instant case is unique in that it involves an act not inconsistent with a lawful purpose and engaged in by those millions of persons who daily enter banks to transact lawful business therein. The *animus* must be present and this is generally susceptible of proof only by the actual consummation of the intended felonious act. The act is not criminal *per se* such as tearing open mail bags or breaking the seal on a railroad car.

Otherwise, if the robber enters the bank, commits the robbery under aggravated circumstances, takes and carries away a sum in excess of \$100, at least three counts are

ascertained immediately, sentence imposable thereon aggregating fifty-five (55) years. If the entrance is made under aggravated circumstances, and there being deemed to be no merger into subsection (d), the aggregate is sixty (60) years, twenty-five (25) years in each of the aggravated subsection (a) offenses and ten (10) years under the subsection (b) offense.

Under this interpretation of the statute, the aggravated portion thereof simply becomes a means of adding five (5) years to the various counts, instead of providing the maximum as Congress plainly desired it should.

However, no difficulty has arisen concerning the larceny provision. It appears that at least one of the purposes for which the 1937 amendment was designed is being recognized by the courts, namely, to prevent a reoccurrence of the situation described in the Attorney General's letter. The Fifth Circuit Court of Appeals alone has held that the amendment has a broader meaning than widening the scope of the Act and that it covers one stage or phase of the crime of bank robbery so that mere entry and subsequent consummation of the unlawful enterprise are separate and distinct crimes, each punishable by maximum penalty of twenty (20) years imprisonment if committed under non-aggravated circumstances, and twenty-five (25) years if committed under aggravated circumstances. The contention of petitioner and that of the Fifth Circuit are obviously irreconcilable.

An examination of some of the ultimate results which follow adherence to the latter doctrine is interesting and somewhat disconcerting.

In the first place, the courts have often laid down the rule that the maximum sentence assessable under Sec. 588b subsections (a) and (b) and Sec. 2113 (a) and (d) is twenty-five (25) years. See cases hereinabove cited.

Treating the entrance with intent provision as a separate but distinct facet of the typical bank robbery, automatically, and with distressing finality, adds another twenty (20) years, at least, to the twenty-five (25) year sentence. In effect, the statute is being judicially rewritten to provide a maximum of forty (40) years instead of twenty (20) years for violation of subsection (a) of the bank robbery act.

No justification for such interpretation is evident from a clear reading of the statute.

Secondly, the courts have held that irrespective of how many persons were placed in jeopardy, the accused can be sentenced to a maximum of twenty-five (25) years only. *Dimenza v. United States*, 130 F. 2d 465 (C.A. 9). However, if the interpretation of the Fifth Circuit is deemed correct, the accused may rob a bank placing twenty persons in jeopardy, and if no intent count is charged, could be sentenced to a maximum term of twenty-five (25) years, since the aggravated or jeopardy section of the statutes would be applicable. The number of persons placed in jeopardy is immaterial. However, if he endangers only one person and the entrance with intent count is charged in addition to the aggravated circumstances count, the accused could be sentenced to twenty-five (25) years on the aggravated count, and in addition thereto to a term of twenty (20) years on the entrance with intent count, or a total of forty-five (45) years. He is thus sentenced to a longer term for an act that placed far fewer persons in jeopardy and is, at least in degree, a less dangerous act than the former example, by the simple expedient of adding an intent count to the indictment—the very intent or *animus* that must be present in all felony cases.

The holdings of the court below appear to be indefensible. Suppose the bank robber flourishes his gun and threatens

a bank guard as he enters the bank. That would be entrance with intent under aggravated circumstances according to the Fifth Circuit's view, and subjects the criminal to a maximum term of twenty-five (25) years' imprisonment. Then, the felon threatens a teller with the weapon. This act is covered by the aggravated portion of the statute also and would subject the robber to an additional twenty-five (25) years. Hence, logically, for commission of the two "separate crimes" the robber would be liable to fifty (50) years' imprisonment. Or would he? In *Durrett v. United States*, supra, the Fifth Circuit stated as follows, at page 439:

"With respect to Count Two (intent count) there is no indication of a merger, as there is nothing in the record to show that the appellant put in jeopardy the life of any person by the use of a dangerous weapon or device when he entered the bank with intent to commit a larceny therein; but conceding that he did commit the crime of so entering the bank in an aggravated manner and form demonstrated in subsection (b) of said Sec. 588b, he was not charged therewith in the indictment but was charged with a lesser offense * * * and should not now be heard to say that his offense was more serious than the one to which he plead guilty."

This language indicates that if the entrance were made under aggravated circumstances, the act would merge, along with the crime of actual bank robbery by force and intimidation, into the aggravated portion of the Act which provides for a total of twenty-five (25) years. But there is no merger if the entry is made without aggravated circumstances, so that the accused may be assessed a total of forty-five (45) years instead of twenty-five (25) years. Proof of a more serious crime will subject the defendant to

a lesser sentence. The doctrine, although almost unbelievable, appears settled in the Fifth Circuit. Any doubt that may be entertained as evidenced by the above quoted language is resolved by its statement in syllabus 3:

“ * * * The offense charged in first count (entry with intent to commit larceny) was not merged in the offenses charged in subsequent counts, especially where record did not show that defendant put the life of any person in jeopardy by use of a dangerous weapon or device when he entered the bank with intent of committing larceny therein. * * * ”

This last case is commented only to emphasize the confusion that can arise and has arisen because of the failure of the courts, particularly the Fifth Circuit, to recognize the true intent of the legislature in enacting the provision in question herein. Strict interpretation of the act, in conformity with the clear purposes for which it was enacted, would most certainly eliminate to a great extent the present confusion, and which unjustifiably subjects those committing the crime to punishments of varying degrees, depending upon the *situs* of the sentencing court. The actual robbery under aggravated circumstances embraces the entry with intent, since in each case the first crime is always present, and the entry count, as interpreted below, is related to it and depends upon it for its existence and illegality.

If the four different crimes theory is correct, the entry with intent provision clearly is in the nature of a burglary, and Count Two of the indictment herein is void in any event; but if the statute provides for one offense with different degrees of aggravation upon which the severity of sentence is dependent, the ultimate sentence in point of severity is twenty-five (25) years, and Count Two of the

indictment would necessarily merge into Count One which is susceptible to the maximum sentence. It is respectfully pointed out that the syllabus numbered three in *Holiday v. Johnston*, supra, contains the following language which is peculiarly apropos to the case at bar:

“Where defendant pleaded guilty to count charging robbery of an insured bank and count for jeopardizing lives of the bank officials and was sentenced to ten (10) years under the first and to fifteen (15) years under the second count, to run consecutively * * * the statute under which prosecution was brought did not create two separate crimes but merely prescribed alternative sentences for the same crime. * * * ”

The court further states:

“The respondent admits that Section 2 of the Act of May 18, 1934, supra, does not create two separate crimes, but describes alternative sentences for the same crime, depending upon the manner of its perpetration.”

If it is held that both of the acts prohibited in subsection (a) of the reenactment do not merge in (d) thereof when aggravated circumstances are present, then the maximum under the Act will always be at least forty-five (45) years if such circumstances are present instead of twenty-five (25) years since entry with intent to commit a felony therein will necessarily be one of the steps of any bank robbery taking place within the premises unless a bizarre and unlikely set of facts are developed.

Such entry with intent will necessarily also be a part of the acts of grand and petit larceny prohibited in subsection (b). Thus, if a person carries away a sum of less than \$100 under that subsection, he can be sentenced to a term of

one year for the petit larceny and twenty (20) years for the entry of the bank with intent to commit a felony therein. It becomes a felony to enter with intent to commit a misdemeanor. It is inconceivable that Congress ever intended such an incongruous result. Certainly, the Attorney General did not so visualize this result when he merely requested that the Act be expanded to include burglary and larceny.

Under the doctrine laid down in *Jerome v. United States*, 318 U.S. 101, 63 S. Ct. 483, 87 L. Ed. 640, the statute making it a Federal offense to enter or attempt to enter a bank with intent to commit a felony therein, includes only those Federal felonies which affect a bank protected by the Act. Therefore, again it is made clear that when one of the acts prohibited in these subsections is committed within the bank, as occurs in practically all bank robberies, entrance with intent will necessarily be a part of the unlawful enterprise, and simply supplies a handy and simple expedient of possibly doubling the otherwise permissible sentence. All such acts, which are part of the whole, the whole being the actual bank robbery, become part of the whole for the purpose of sentence.

It is submitted that all subsection (a) and (b) offenses are deemed to be merged in the aggravated count when it is charged. When the aggravated count is not charged, then it appears that only one of the lesser crimes in (a) and (b) of the reenactment can stand unless a true burglary is committed. Otherwise, the prosecutor is again given a handy expedient in that he can draft his indictment so that it charges non-aggravated offenses, thus giving him the opportunity to obtain a sentence on three of the four offenses defined in subsections (a) and (b), namely, robbery by force and violence, entry with intent, and either grand or petit larceny, with a possible maximum sentence aggregating fifty (50) years.

It is respectfully urged by petitioner that the rights and liberties of individuals should not be dependnt upon the ingenuity of the prosecutor in manipulating the subsections of the statue so as to obtain the maximum possible under the facts of the particular case. It is submitted that the simple example given probably covers the fact structures contained in a great majority of the bank robberies. Instead of following the clear intent of the Congress to provide a maximum sentence as set out in subsection (d), the prosecution will become a travesty and more in the nature of a game rather than a bona fide effort to sentence a felon to a term consistent with that intended by Congress he should serve.

This pyramiding of offenses is precisely what happened in the case at bar and similar cases in the Fifth Circuit. *Durrett v. United States, supra*. Congressional intent urging interpretation of the statute under the merger theory so as to limit the maximum sentence under subsections (a), (b) and (d) to the maximum prescribed in the latter subsections appears clear and persuasive and should be given great weight by the Court.

POINT D

Even if the act or transaction herein involved violated two distinct statutory provisions and irrespective of the intent of the Congress in enacting the amendment of 1937 to the bank robbery statute, it is clear that the acts herein complained of constituted only one crime for the purpose of sentence.

The rule invoked herein was adequately expressed in the early bank robbery case of *Hewitt v. United States, supra*. The indictment therin contained two counts. The first count charged the defendant with having forcibly robbed the bank; the second count charging that while committing

the robbery he put the lives of persons in jeopardy by the use of dangerous weapons. These counts charged violation of 12 U.S.C. 588b (a) and (b), now 18 U.S.C. 2113 (a) and (d). The defendant was given the maximum sentence prescribed by law for each violation—twenty (20) years on the first count, and twenty-five (25) years on the second count, to be served consecutively. On appeal the prisoner contended that the court erred in imposing a sentence under each count to be served consecutively, and that no sentence should have been imposed upon the first count for the reason that the robbery of the bank did not constitute two separate crimes for the purpose of punishment.

Without reference to the merger theory, the court sets forth the rule which is applicable to the case at bar. At page 10 it states:

“The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether *each* provision requires proof of an additional fact which the other does not.”

The court held that the robbery of the bank constituted for the purpose of sentence but one offense and sentence should not have been imposed on the first count of the indictment which was ordered vacated. See also *Gavieres v. United States*, 220 U. S. 338, 342, 31 S. Ct. 421, 55 L. Ed. 489; *Blockburger v. United States*, 284 U. S. 299, 304, 52 S. Ct. 180, 182, 70 L. Ed. 306; *Casebeer v. United States*, 87 F. 2d 668, 669 (C.A. 10).

In the case at bar, the record shows that the petitioner entered the bank through a regular entrance, said some words to one of the employees, displayed a dangerous weapon, asked for money, obtained it, and fled. Can it be

said that even if the entry with intent provision is deemed to be a separate crime not in the nature of burglary, and but one phase of a typical bank robbery, and thus applicable herein, that proof of *each* of the two offenses charged will require proof of additional fact the other does not require? The answer must be in the negative.

While proof of the robbery itself requires the showing of additional facts not required to prove the entry with intent, the converse is not true. There are no additional facts necessary to prove the entry with intent. Proof of the robbery under aggravated circumstances will include all proof necessary to prove such entrance. Intent is shown by commission of the act; entrance is proved by showing where petitioner was when he displayed the dangerous weapon. Every case of a robbery of a bank under the facts of this case will necessarily include entrance with intent.

Perhaps it may be argued that the first part of subsection (a) of both the earlier statute and the reenactment does not require that the act therein prohibited take place inside the premises of the bank or savings and loan association, and that since the entry with intent provision by its terms clearly requires such entry, the additional fact is developed bringing these two crimes within the rule. Each offense thus requires proof of an additional fact that the other does not. But see *Durrett v. United States, supra*.

To indiscriminately and academically apply the rule herein would work an injustice and would have to involve a total disregard of the facts in this case which show a typical bank robbery, which must necessarily include proof of entrance with intent.

Petitioner submits that under the facts of this case, even if the intent of the legislature is deemed broader than pointed out in Point A, the robbery of the bank, for the purpose of punishment, did not constitute two separate crimes.

Conclusion

Therefore, it is respectfully submitted that the judgment of the United States Circuit Court of Appeals for the Fifth Circuit should be reversed and this cause remanded with instructions to vacate or expunge the fifteen (15) year sentence imposed upon Count Two of the indictment herein involved.

JOSEPH COHEN,
CHARLES S. SCHNIDER,
JOSEPH P. JENKINS,
Counsel for Petitioner.

(2276-4)

INDEX

Opinion below	1
Jurisdiction	1
Questions presented	1-2
Statutes involved	2-6
Statement	
Summary of Argument	6-12
Argument	
I. Under established principles which long antedated this statute, 18 U. S. C. 2113 (the present bank robbery statute) must be construed as having created separate crimes of entry and robbery....	13-14
A. Before 1937, when the Bank Robbery Act was amended to cover entry, it was firmly established in federal law that a statute or statutes prohibiting successive steps in what would usually be one criminal transaction created separate offenses, separately punishable	14-21
B. The purpose and pattern of the Bank Robbery Act, as reflected in its legislative history, show that Congress intended that the entry into a bank with intent to commit robbery and the completed robbery should be treated as separate and distinct offenses and separately punishable	21-28
C. The judicial gloss which had been placed on the statute before its reenactment, as well as the form of its reenactment in the 1948 revision of the Criminal Code, further support the view that entry with intent to rob and robbery are separate offenses	29-38
II. Entry unaccompanied by force but with intent to rob is an offense under the statute which does not, as a matter of double jeopardy, merge into the completed robbery	38-39

Argument—Continued

Page

A. The statute itself and its legislative history make it clear that any entry with the requisite intent is a cognizable offense under 18 U. S. C. 2113 (a).....	39-42
B. An entry unaccompanied by force does not merge in the completed offense of robbery as a matter of the constitutional protection against double jeopardy....	42-45
Conclusion.....	45
Appendix A.....	46-47
Appendix B.....	47-48
Appendix C.....	49-51

CITATIONS

Cases:

<i>Adams v. United States</i> , 281 U. S. 202.....	17, 20
<i>Albrecht v. United States</i> , 273 U. S. 1.....	7, 12, 17, 44
<i>Alford v. United States</i> , 113 F. 2d 885.....	41
<i>American Tobacco Co. v. United States</i> , 328 U. S. 781..	29
<i>Audett v. United States</i> , 132 F. 2d 528, certiorari denied, <i>Audett v. Johnston</i> , 323 U. S. 743.....	32, 33, 41
<i>Barkdoll v. United States</i> , 147 F. 2d 617.....	30, 34, 35
<i>Bell v. United States</i> , 349 U. S. 81.....	10, 20, 39
<i>Blockburger v. United States</i> , 284 U. S. 299.....	19, 43, 45
<i>Burton v. United States</i> , 202 U. S. 344..	7, 12, 15, 16, 17, 25, 44
<i>Carter v. McClaghry</i> , 183 U. S. 365.....	16, 43
<i>Casebeer v. United States</i> , 87 F. 2d 668, certiorari denied, <i>Casebeer v. Hudspeth</i> , 316 U. S. 683.....	37
<i>Clark v. United States</i> , 184 F. 2d 952, certiorari denied, 340 U. S. 955.....	37
<i>Crum v. United States</i> , 151 F. 2d 510.....	30
<i>Dimenza v. Johnston</i> , 130 F. 2d 465.....	30, 35
<i>Durrett v. United States</i> , 107 F. 2d 438.....	30, 32
<i>Ebeling v. Morgan</i> , 237 U. S. 625.....	19
<i>Gant v. United States</i> , 161 F. 2d 793.....	30
<i>Gavieres v. United States</i> , 220 U. S. 338.....	20, 43
<i>Gebhart v. United States</i> , 163 F. 2d 962.....	33
<i>Gilmore v. United States</i> , 124 F. 2d 537, certiorari denied, 316 U. S. 661.....	37
<i>Halligan v. Wayne</i> , 179 Fed. 112, certiorari denied, 218 U. S. 680.....	16
<i>Heflin v. United States</i> , 223 F. 2d 371.....	32

Cases—Continued

	Page
<i>Hewitt v. United States</i> , 110 F. 2d 1, certiorari denied, 310 U. S. 641.....	33
<i>Holbrook v. Hunter</i> , 149 F. 2d 230.....	32
<i>Holbrook v. United States</i> , 136 F. 2d 649.....	30
<i>Holiday v. Johnston</i> , 313 U. S. 342.....	30
<i>Jerome v. United States</i> , 318 U. S. 101.....	36
<i>Kelly v. Johnston</i> , 128 F. 2d 793, certiorari denied, 317 U. S. 699.....	39
<i>Korematsu v. United States</i> , 323 U. S. 314.....	29
<i>Lockhart v. United States</i> , 136 F. 2d 122.....	30
<i>McDonald v. Moinet</i> , 139 F. 2d 939, certiorari denied, 322 U. S. 730.....	30
<i>McNealy v. United States</i> , 164 F. 2d 600.....	32
<i>Madigan v. Wells</i> , 224 F. 2d 577, certiorari denied, 351 U. S. 911.....	35
<i>Miller v. United States</i> , 147 F. 2d 372.....	30
<i>Morgan v. Devine</i> , 237 U. S. 632. 7, 9, 15, 16, 17, 19, 26, 38, 44	
<i>O'Keith v. United States</i> , 158 F. 2d 591.....	30
<i>People v. Webber</i> , 138 Cal. 145, 70 P. 1089.....	40
<i>Pinkerton v. United States</i> , 328 U. S. 640.....	16, 43
<i>Price v. United States</i> , 193 F. 2d 523.....	34
<i>Rawls v. United States</i> , 162 F. 2d 798, certiorari denied, 332 U. S. 781.....	32, 41
<i>Simunov v. United States</i> , 162 F. 2d 314.....	33, 34
<i>State v. Petit</i> , 32 Wash. 129, 72 P. 1021.....	40
<i>Steffler v. United States</i> , 143 F. 2d 772, certiorari denied, 323 U. S. 746.....	32, 33, 41
<i>Sunal v. Large</i> , 332 U. S. 174.....	38
<i>United States v. Daugherty</i> , 269 U. S. 360.....	19
<i>United States v. Universal Corp.</i> , 344 U. S. 218.....	20
<i>United States v. Michener</i> , 331 U. S. 789.....	19, 29, 44
<i>United States v. Raynor</i> , 302 U. S. 540.....	18
<i>Vautrot v. United States</i> , 144 F. 2d 740.....	30
<i>Ward v. United States</i> , 183 F. 2d 270.....	30, 32
<i>Wells v. Swope</i> , 121 F. Supp. 718.....	35
<i>Wells v. United States</i> , 124 F. 2d 334, certiorari denied, 316 U. S. 661.....	31
<i>White v. United States</i> , 85 F. 2d 268.....	43
<i>Wilson v. United States</i> , 145 F. 2d 734.....	30, 35

Statutes:

	Page
Act of June 8, 1872, 17 Stat. 283.....	15
Act of May 18, 1934, ch. 304, Section 2, 48 Stat. 783, as amended by the Act of August 24, 1937, c. 747, 50 Stat. 749, 12 U. S. C. [1946 ed.] 588b and c.....	4-6, 23, 24, 35, 47
Act of August 24, 1937, c. 747, 50 Stat. 749.....	28
Act of June 25, 1948, c. 645, 62 Stat. 796.....	36
Criminal Code, Section 197.....	15, 39
Narcotics Act, Sections 1 and 2.....	20
National Prohibition Act, Section 3, Title II, 41 Stat. 308.....	17, 18
Penal Code, Section 190.....	8, 11, 15, 25, 26, 40
Penal Code, Section 192.....	15
R. S. 1782.....	17
12 U. S. C. (1946 ed.) 588b (b).....	30, 31
12 U. S. C. [1940 ed.] 588a, 588b, 588c.....	36
18 U. S. C. 334.....	21
18 U. S. C. 656.....	21
18 U. S. C. 1005.....	21
18 U. S. C. 1708.....	15
18 U. S. C. 2113 commonly called the Bank Robbery Act.....	2-4, 6, 7, 9, 10, 11, 36, 43
18 U. S. C. 2114.....	15
18 U. S. C. 2115.....	15
§ 459 Penal Code of California, Deering (1937).....	40

Miscellaneous:

78 Cong. Rec. 2946.....	23
78 Cong. Rec. 5738.....	21, 23, 46
78 Cong. Rec. 8132.....	23
78 Cong. Rec. 8264.....	23
78 Cong. Rec. 8322.....	23
78 Cong. Rec. 8775.....	23
78 Cong. Rec. 8776.....	23
78 Cong. Rec. 8778.....	23
78 Cong. Rec. 8856.....	23
78 Cong. Rec. 8857.....	23
81 Cong. Rec. 2731.....	26
81 Cong. Rec. 4656.....	27
81 Cong. Rec. 5376.....	27, 28
81 Cong. Rec. 9331.....	28
H. Rep. No. 1598, 73d Cong., 2d sess.....	23

Miscellaneous—Continued

	Page
H. R. 5900, 75th Cong., 1st sess.	26
H. Rep. No. 732, 75th Cong., 1st sess.	24, 26, 49
H. Rep. No. 304, 80th Cong., 1st sess., p. 135, Appendix.	36
H. Rep. 1461, p. 2.	21, 23
1 <i>Law and Contemporary Problems</i> (1934) 445, 448-449.	24
S. 2841, 73d Cong., 2d sess.	21
S. Rep. No. 537, 73d Cong., 2d sess.	21, 23
S. Rep. No. 1259, 75th Cong., 1st sess.	28
Miller (1934) <i>Criminal Law</i> , p. 339.	40
Rule 35, F. R. Crim. P.	6

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 132

OLLIE OTTO PRINCE, PETITIONER

v.

UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT**

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 8-14) is reported at 230 F. 2d 568.

JURISDICTION

The judgment of the Court of Appeals was entered on February 29, 1956 (R. 14). The petition for a writ of certiorari was filed on March 26, 1956, and granted on June 4, 1956 (R. 15; 351 U. S. 962). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether separate sentences could validly be imposed under the Bank Robbery Act [18 U. S. C. 2113 (a)] for entering a bank with intent to rob and for robbery.

2. Whether entry unaccompanied by force but with intent to rob is an offense under the statute.

3. Whether the fact that the entry with intent to rob may not have been accompanied by force results in a merger of the offense of entry with that of robbery.

STATUTES INVOLVED

18 U. S. C. 2113 [1952 ed.], commonly called the Bank Robbery Act, provides in pertinent part as follows:

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association; or

Whoever enters or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part as a bank, or as a savings and loan association, with intent to commit in such bank, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny—

Shall be fined not more than \$5,000 or imprisoned not more than twenty years, or both.

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding \$100 belonging to, or in the care, custody, control, management, or possession of any bank,

or any savings and loan association, shall be fined not more than \$5,000 or imprisoned not more than ten years, or both; or

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding \$100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

(c) Whoever receives, possesses, conceals, stores, barter, sells, or disposes of, any property or money or other thing of value knowing the same to have been taken from a bank, or a savings and loan association, in violation of subsection (b) of this section shall be subject to the punishment provided by said subsection (b) for the taker.

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than \$10,000 or imprisoned not more than twenty-five years, or both.

(e) Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or punished by death if the verdict of the jury shall so direct.

(f) 'As used in this section the term "bank" means any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States, and any bank the deposits of which are insured by the Federal Deposit Insurance Corporation.

* * * * *

The predecessor statute, the Act of May 18, 1934, ch. 304, Section 2, 48 Stat. 783, as amended by the 'Act of August 24, 1937, c. 747, 50 Stat. 749, 12 U. S. C. [1946 ed.] 588b and c, reads as follows:

§ 588b:

(a) Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank; or whoever shall enter or attempt to enter any bank, or any building used in whole or in part as a bank, with intent to commit in such bank or building, or part thereof, so used, any felony or larceny, shall be fined not more than \$5,000 or imprisoned not more than twenty years, or both; or whoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value exceeding \$50 belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than \$5,000 or imprisoned not more than ten

years, or both; or whoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value not exceeding \$50 belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

(b) Whoever, in committing, or in attempting to commit, any offense defined in subsection (a) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not less than \$1,000 nor more than \$10,000 or imprisoned not less than five years nor more than twenty-five years, or both.

(c) Whoever shall receive, possess, conceal, store, barter, sell, or dispose of any property or money or other thing of value knowing the same to have been taken from a bank in violation of subsection (a) of this section shall be fined not more than \$5,000 or imprisoned not more than ten years, or both.

§ 558c:

Whoever, in committing any offense defined in section 558b of this title, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be punished by imprisonment for not less than 10 years, or by death if the verdict of the jury shall so direct.

STATEMENT

Following a trial by jury, petitioner was convicted in November 1949 in the United States District Court for the Western District of Texas under a two-count indictment charging that in October 1948 he (1) took \$15,764 belonging to a federally-insured bank from an employee of such bank by intimidating said employee and in the course thereof placing the life of such employee in jeopardy by the use of a dangerous weapon, and (2) entered the bank with intent to commit the felony of robbery, in violation of 18 U. S. C. 2113 (a) and (d) (R. 1-2). He was sentenced to consecutive terms of imprisonment of 20 years on count one and 15 years on count two (R. 3).

The present proceedings were initiated in June 1955 by petitioner's motion under Rule 35, F. R. Crim. P., to correct his sentence upon the ground that both counts of the indictment stated only one offense and that the total thirty-five-year sentence imposed under the indictment was in excess of the twenty-five-year maximum sentence permissible under 18 U. S. C. 2113 (R. 5-6). The District Court denied the motion in August 1955 (R. 6). On appeal, the Court of Appeals unanimously affirmed (R. 14).

SUMMARY OF ARGUMENT**I**

A. The bank robbery statute (18 U. S. C. 2113), first passed in 1934, and amended in 1937 to include the offenses of burglary and larceny, cannot be interpreted in isolation from the settled course of judicial decision

which long antedated its enactment. By 1937, a number of decisions by this Court had made it clear (as a matter both of statutory construction and double jeopardy) that federal statutes punishing a number of related acts would be construed as punishing "separately each step leading to the consummation of a transaction" as well as the completed transaction itself. *Albrecht v. United States*, 273 U. S. 1, 11. This Court so ruled in the *Albrecht* case as to possession and sale of the same liquor at the same time, and in *Burton v. United States*, 202 U. S. 344, as to an agreement to receive and receipt of unlawful compensation by a United States Senator. Specifically related to the problems of this case is the decision in *Morgan v. Devine*, 237 U. S. 632, holding that forcible entry into a post office with intent to commit larceny and theft of post office property were two separate offenses, separately punishable. All these decisions rest their interpretation of the legislative intent solely upon the language of the statute.

This was the climate of legal thinking with respect to multiple offenses in which this statute was passed. There is nothing in the legislative history of the statute to indicate that, insofar as the instant problem was involved, Congress intended that the statute should be interpreted differently from other federal criminal statutes. As a matter of wording, each successive step is made separately punishable.

B. The purpose and pattern of section 2113 (a), as reflected in its early legislative history, also show that Congress intended that the entry into a bank with intent to commit a robbery and the completed

robbery should be treated as separate and distinct offenses, separately punishable. In 1934, the Attorney General recommended a bill to create a number of new federal offenses dealing with bank crimes, which covered larceny, burglary, and robbery, respectively. Each section defined the elements of the offense it covered and set forth the penalty for its commission. In this form, there can be little doubt that, under the decisions of this Court, the bill would have been interpreted as creating the separate offenses of larceny, burglary and robbery, (with an increased penalty for aggravated robbery) even though the offenses would usually be interrelated.

The final enactment in 1934 created only one offense—that of robbery of federally-insured banks with provision for increased punishment for aggravated robbery. In 1937, Congress, upon the Attorney General's recommendation, amended section 2 (a) of the Bank Robbery Act as enacted in 1934 by adding thereto provisions defining burglary (in its modern statutory form) and larceny. There is nothing, however, to indicate that any one thought that this form of defining the initial offenses of robbery, burglary, and larceny in one section, rather than in separate sections as had originally been proposed in 1934, would have the effect of making one of the defined crimes merge into the other. On the contrary, the language which was used in the recommended draft of the bill, defining burglary as entry with intent to commit "any larceny or other depredation," was evidently taken from section 190 of the Penal Code as to post office offenses which, as noted above, had been held in

Morgan v. Devine, 237 U. S. 632, to create an offense which was separate from a completed post office theft, and *a fortiori* from robbery. In addition, the House floor debate on this amendment showed complete agreement concerning the separateness of the offense of burglary. The statute as enacted in 1937 was essentially the same as that proposed by the Attorney General in 1934, defining the crimes which had long been held to be separate offenses—burglary, larceny and robbery.

C. Both the judicial gloss and the language changes of the 1948 revision tend to support the view that under this statute entry with intent to rob and robbery are separate offenses.

On the specific problem involved here, the Fifth and Tenth Circuit Courts of Appeals had squarely held, and the Seventh and Eighth had clearly indicated in dicta, that they regarded entry with intent to rob and robbery as separate offenses. On the other hand, only the Sixth Circuit had held, obliquely, and the Ninth Circuit had at most indicated, even more obliquely, that the offenses merged.

Section 2113 (a) was enacted into its present form by the June 1948 revision. The legislative history indicates that this revision made no substantial change in the statute. Had the revisers intended that the offenses of robbery and entry under the statute should not be distinct and separate offenses, punishable as such, as held by the majority of the Courts of Appeals, they would have changed it accordingly. Their awareness of federal decisions under the Act is indicated by the changes, not here relevant, made in the

Act to conform to this Court's decision in *Jerome v. United States*, 318 U. S. 101. Instead, the structural changes to include robbery in one paragraph of section 2113 (a) and entry in another paragraph, with two alternate larceny provisions in separate paragraphs of section 2113 (b), indicated recognition and approval of the majority view that section 2113 (a) created the separate offenses of entry and robbery which were punishable as such. Thus there is nothing in the particular legislative history of the instant statute to indicate that Congress intended that it should be interpreted differently from other federal criminal statutes.

II

Entry into a bank unaccompanied by force but with intent to rob is an offense under section 2113 (a) and does not, as a matter of double jeopardy, merge into the completed robbery. There is a serious problem as to whether petitioner can now raise this problem since the indictment does not characterize the nature of the entry. Such an attack goes to the sufficiency of the evidence at the trial and is not normally cognizable on collateral attack. In the past the rule has been that an indictment which purports to charge a federal offense on its face cannot be challenged collaterally. However, in view of this Court's decision in *Bell v. United States*, 349 U. S. 81, it may consider that the failure to characterize the entry in the indictment justifies the assumption, which is the actual fact here, that the entry was not forcible and occurred in the daytime. We therefore discuss the problem on this assumption.

A. The statute itself and its legislative history show that any entry with the required intent is an offense cognizable under section 2113 (a). The statute on its face contains no language limiting its application only to forcible entries. The omission of the word "forcible" must have been deliberate since the 1937 amendment was apparently modeled after section 190 of the former Penal Code which used the words "forcibly break into". The omission was in accord with developing concepts of burglary. Although during the debates on the floor of the House of Representatives, the statute was described as creating the offense of "breaking and entering", there is no indication that this was intended to mean that section 2113 (a) was limited to forcible entries. Moreover, the continuation of the 1937 phraseology in the 1948 revision was an acceptance of the interpretation given by a number of federal courts, without any disagreement, that section 2113 (a) covered entries accomplished without the use of force.

B. An entry unaccompanied by force does not merge into the completed offense of robbery as a matter of the constitutional protection against double jeopardy. If, as a matter of statutory construction, the offenses were intended to be distinct, they cannot be held to have merged with each other, unless by definition they are so inseparable that one necessarily embraces the other. In making this determination, the test which is generally applied is whether one offense requires proof of elements different from those required for the other. Here, the elements of the offense of entry of a bank with intent to rob are different from the elements of the offense of robbery.

Assault upon the person is no element of the crime of burglary as defined in the statute, but is essential to robbery. Entry into the bank is no element of the crime of robbery. The fact that robbery of bank employees is frequently preceded by entry into the bank is, under the decisions of this Court, not controlling. Entry is less an inevitable part of the offense of robbery than possession is normally a part of sale (*Albrecht v. United States*, 273 U. S. 1) or agreement to receive compensation is normally a part of the receipt of compensation (*Burton v. United States*, 202 U. S. 344).

ARGUMENT

Although admitting that Congress intended to make burglary of a bank a crime and that common law burglary is a separate crime which does not merge into a subsequent robbery, petitioner argues that Congress, in redefining burglary as entry with intent to commit a felony, did not intend to make such entry a separate crime when followed by a robbery. Petitioner further argues that entry with intent to commit a felony but not accompanied by force is either not a crime under the statute or is a crime which necessarily merges into a subsequent robbery so that a separate sentence may not be imposed for the entry.

It is the government's position that, long before this particular crime was defined, it was a well established principle of federal criminal law that a single statute could proscribe as separate offenses various acts which might often be part of one criminal transaction. In view of this principle, the language

of the statute itself, and judicial decisions under the statute between the date of its original enactment and subsequent revision in the 1948 code, the statute must be held to have created separate crimes of entry and robbery, even though these acts were part of one transaction. The result is that each was separately punishable, the extent of punishment being left to the discretion of the trial judge within the statutory limits. We show further that entry unaccompanied by force but with intent to commit a felony is an offense as defined by the statute. The entry can be held to have merged with the robbery only if the elements thereof are so inseparable that, as a matter of the constitutional protection against double jeopardy, the acts could not be separately punished. The crimes here charged are not, under the settled decisions of this Court, thus inseparable.

I

UNDER ESTABLISHED PRINCIPLES WHICH LONG ANTE-DATED THIS STATUTE, 18 U. S. C. 2113 (THE PRESENT BANK ROBBERY STATUTE) MUST BE CONSTRUED AS HAVING CREATED SEPARATE CRIMES OF ENTRY AND ROBBERY

Robbery of federally-insured banks was first made a federal crime in 1934. The provisions creating the crimes of entry into a bank with intent to commit a felony (burglary as defined in the statute) and taking of the bank's property without robbery (larceny) were not enacted until 1937. In attempting to determine the intent of so recent a statute, it is inappropriate to ignore, as petitioner has done, the whole

preceding history of the interpretation of federal criminal statutes. In isolation, the language of this statute, like that of others discussed below, might be deemed inconclusive on the issue of whether Congress intended to punish each offense separately or merely to punish the offense of entry when it did not result in a completed act of larceny or robbery. In the light of principles which had been firmly embedded in federal criminal law by 1937, however, the conclusion seems to us inescapable that the offenses were intended to be separate. To interpret this statute as creating only one offense would require the assumption that Congress was wholly unaware of the course of judicial decision in federal criminal law as to multiple offenses and would in effect overrule a multitude of rulings in this field, affecting many criminal statutes. We therefore discuss first the course of judicial decision before 1937 on the interpretation of federal criminal offenses arising out of one transaction, and then against that background consider the history of this statute at the time of its original enactment and in the 1948 revision of the Criminal Code.

A. BEFORE 1937, WHEN THE BANK ROBBERY ACT WAS AMENDED TO COVER ENTRY, IT WAS FIRMLY ESTABLISHED IN FEDERAL LAW THAT A STATUTE OR STATUTES PROHIBITING SUCCESSIVE STEPS IN WHAT WOULD USUALLY BE ONE CRIMINAL TRANSACTION CREATED SEPARATE OFFENSES, SEPARATELY PUNISHABLE

On the issue discussed in this point—whether Congress intended to make entry with intent to rob a separate offense punishable independently from the punishment for the completed act of robbery—it might

perhaps be sufficient as background to point to the decision of this Court in *Morgan v. Devine*, 237 U. S. 632, involving sections 190 and 192 of the former Penal Code (present 18 U. S. C. 1708, 2115; see also as to robbery former section 197 of the Criminal Code, present section 2114), which are so similar in structure to the instant statute that they may well have served as a model for this legislation. Section 190 prohibited theft of post office property, section 192 the forcibly breaking into a post office with intent to commit any larceny,¹ both sections having been originally enacted as part of the Act of June 8, 1872, 17 Stat. 283. This Court held that the forcible entry with intent to steal, and the stealing, were two separate and distinct offenses for which two consecutive sentences could validly be imposed. The Court said (237 U. S. at p. 639): "It being within the competency of Congress to say what shall be offenses against the law, we think the purpose was manifest in these sections to create two offenses." And further (237 U. S. at p. 640): "* * * the test is not whether the criminal intent is one and the same and inspiring the whole transaction, but whether separate acts have been committed with the requisite criminal intent and are such as are made punishable by the act of Congress."

This result was by no means compelled by the state of decision at the time, despite the holding in *Burton v.*

¹ The instant statute punishes any entry with intent, not merely a forcible entry. This difference is relevant at most only to the issue of merger discussed in Point II, *infra*, pp. 38-45, but not on the issue of whether separate offenses were created by the prohibition of various steps in one transaction.

United States, 202 U. S. 344, discussed below. The considerations that supported a contrary holding that the burglary merged in the completed theft had been set forth by the Court of Appeals for the Ninth Circuit in *Halligan v. Wayne*, 179 Fed. 112 (C. A. 9), certiorari denied, 218 U. S. 680. That holding was called to the attention of the Court in the briefs filed in the *Morgan* case (No. 685, O. T. 1914). And while the *Morgan* decision rests upon the assumed purpose of Congress, neither the Court in its decision, nor either side in its briefs, referred to any evidence of Congressional intent other than that gleaned from the statute itself.

The most significant point is that *Morgan v. Devine* was no sport in federal criminal law. It was preceded and has been followed by numerous decisions to the same effect—that where a statute or statutes prohibit the successive steps in what would usually be one criminal transaction, each step is a separate offense on which separate punishment may be imposed even though the transaction was carried through to completion and punishment for the completed offense might also be imposed. Thus, the Court in *Morgan v. Devine* cited *Carter v. McClaughry*, 183 U. S. 365, an early example of what later became a long line of cases holding that conspiracy to commit an offense and the substantive offense itself are separate and distinct.² The Court in *Morgan* also quoted from its prior decision in *Burton v. United States*, 202

² For a more recent expression of this principle, see *Pinkerton v. United States*, 328 U. S. 640, 643-644.

U. S. 344, where it had ruled that separate offenses were committed by a Senator in unlawfully receiving compensation and also agreeing to receive compensation in violation of the same statute. The Court had said in the *Burton* case (202 U. S. at p. 377):

* * * Congress intended to place its condemnation upon each distinct, separate part of every transaction coming within the mischiefs intended to be reached and remedied. Therefore an agreement to receive compensation was made an offense. So the receiving of compensation in violation of the statute, whether pursuant to a previous agreement or not, was made another and separate offense. There is, in our judgment, no escape from this interpretation consistently with the established rule that the intention of the legislature must govern in the interpretation of a statute.

Here again, while the decision rests on the assumed legislative intent, the briefs filed in the case (No. 539, O. T. 1905) reveal no discussion of intent beyond the conclusions to be drawn from the face of the statute. The statute in that case, R. S. 1782, provided in one paragraph for the punishment of a member of Congress who "shall receive or agree to receive any compensation" of the type prohibited.

Morgan v. Devine was followed by *Albrecht v. United States*, 273 U. S. 1, where, under the National Prohibition Act, the defendants were convicted in groups of two counts of both possession and sale of the same liquor at the same time. The defendants contended that the multiple convictions violated the constitutional provision against double jeopardy in

that, the same liquor being involved in both charges, the offense of sale necessarily included the offense of possession. In rejecting this contention, the Court pointed out that it was possible for a person to cause the delivery of liquor of which he had never had possession, and held (273 U. S. at p. 11):

There is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and punishing also the completed transaction.

While the decision is couched in constitutional terms, it necessarily involves a construction of the statute as well, since the constitutional issue would not be present if the offenses were not deemed separate under the statute. Again, the intention of the legislature to create separate offenses rests on nothing more than the words of the statute (section 3, Title II of the National Prohibition Act, 41 Stat. 308) which in one paragraph provided that no person "shall manufacture, sell, barter, transport, import, export, deliver, furnish or possess" any intoxicating liquor except as authorized.

Indicative of the general acceptance by 1937 of this approach to the interpretation of federal criminal statutes is the fact that in *United States v. Raynor*, 302 U. S. 540, decided early in January, 1938, in reviewing for another purpose the history of federal counterfeiting legislation which punished various steps in the operation (such as possession of plates, possession of paper, manufacture and sale of counterfeit money, etc.), this Court spoke in passing of the

offense before it as the "last of seven separate offenses set out in one paragraph." 302 U. S. at p. 548. See, in this connection, *United States v. Michener*, 331 U. S. 789, decided in 1947. There, the Court, in a short *per curiam* opinion, reversed a decision (157 F. 2d 616 C. A. 8) which had held that consecutive sentences could not be imposed where one count charged possession of a plate adapted for counterfeiting and a second count charged that, on the same date as that set forth in the first count, the defendant caused a plate to be made.

Also significant as indicating the general legal attitude toward multiple offenses arising from one transaction are the decisions dealing, not with the steps in one transaction, but with the units of crime affected by one act. While these decisions are not as directly in point on the instant problem as the ones discussed above, they do show the prevailing view that multiple offenses would often result from what was essentially one act. On the same day that the Court decided *Morgan v. Devine*, discussed *supra*, pp 15-16, it held in *Ebeling v. Morgan*, 237 U. S. 625, that the cutting of six mail bags in the course of one transaction constituted six separate crimes. See also *United States v. Daugherty*, 269 U. S. 360, 361, holding that unauthorized sales of cocaine to three different persons on different days constituted separate offenses, as against the contention that the several offenses constituted a single continuous act inspired by the same intent; *Blockburger v. United States*, 284 U. S. 299, decided in 1932, holding not only that separate sales were separate offenses, but that the sale of narcotics

not from the original stamped package and not in pursuance of a written order were two separate and distinct violations under sections 1 and 2 of the Narcotics Act, even though both offenses grew out of one sale; *Adams v. United States*, 281 U. S. 202, 204-205, holding that acquittal for making a false entry in the books of a bank, showing a credit, did not bar prosecution for making a false entry in a report of the condition of the bank showing the same credit. And as to separate offenses under different statutes, see *Gavieres v. United States*, 220 U. S. 338, rejecting a claim of double jeopardy in relation to prosecutions for insulting a public official and for disorderly conduct growing out of the same incident.³

This then was the climate of legal thinking with respect to multiple offenses in which this statute was passed in 1934 and amended in 1937. As we show below, there is nothing in the history of the statute to indicate that Congress intended that, in relation to the problem here involved, this statute should be interpreted in a manner different from that in which federal criminal statutes were then generally being construed, *i. e.*, to make each successive step separately punishable. Rather, such light as the legislative his-

³ Subsequent to the enactment of the instant statute, this Court has held that each breach of the statutory duty owed a single employee under the Fair Labor Standards Act does not constitute a separate offense, *United States v. Universal Corp.*, 344 U. S. 218, and that simultaneous transportation of two women constitutes a single violation of the Mann Act, *Bell v. United States*, 349 U. S. 81. These decisions, like those cited in the above paragraph of the text, relate directly to the units of crime not the specific problem raised here of successive steps in one transaction.

tory throws on the problem indicates the contrary. And to the extent that, by the time the statute was re-enacted as part of the 1948 revision of the Code, it had the gloss of judicial interpretation, there is further indication that the legislators intended entry with intent to rob, and the robbery itself, to constitute separate offenses.

B. THE PURPOSE AND PATTERN OF THE BANK ROBBERY ACT, AS REFLECTED IN ITS EARLY LEGISLATIVE HISTORY, SHOW THAT CONGRESS INTENDED THAT THE ENTRY INTO A BANK WITH INTENT TO COMMIT ROBBERY AND THE COMPLETED ROBBERY SHOULD BE TREATED AS SEPARATE AND DISTINCT OFFENSES AND SEPARATELY PUNISHABLE

Prior to 1934, robbery, larceny, burglary, and other cognate offenses directed against banks organized or operating under federal law were punishable only under state law. Federal law protected such banks merely against embezzlement and kindred offenses by officers, directors, agents, and employees (18 U. S. C. 334, 656, 1005). In 1933, other offenses against banks reached such proportions as to give rise to requests from all sections of the country for federal protection against gangsters operating from one state to another, a situation with which local authorities were frequently unable to cope.⁴

In response to this situation, the Attorney General in 1934 recommended a bill (S. 2841, 73d Cong., 2d sess.) to create a number of new federal offenses.⁵ Sec-

⁴ See H. Rep. 1461, p. 2, and S. Rep. No. 537, 73d Cong., 2d sess.

⁵ The text of the bill as passed by the Senate (78 Cong. Rec. 5738) did not differ materially from the Attorney General's draft. The Senate bill is copied in Appendix A, pp. 46-47, *infra*.

tion 1 of the bill defined the term "bank" as including banks organized or operating under federal law, and member banks of the Federal Reserve System. Section 2 made it a felony to take or attempt to take money or property belonging to or in the possession of a bank, either without its consent or with its consent when such consent was induced by fraud. Section 3 penalized breaking into or attempting to break into a bank with intent to commit any felony. Section 4 (a) prohibited the forcible taking or attempted taking, from the person or presence of another, of any money or property belonging to or in the possession of a bank, and subsection (b) provided an increased penalty if, in the commission of the robbery, any person should be assaulted or placed in jeopardy of his life by the use of a dangerous weapon. Section 5 imposed a minimum penalty of ten years' imprisonment and a maximum penalty of death upon any one who, in committing any offense defined in the bill, or in seeking to avoid apprehension, or attempting to escape after arrest, should kill or kidnap any person.

In the form in which the bill was drawn, there can be little doubt that, under the decisions discussed above, it would have been interpreted as creating the separate offenses of burglary, robbery and larceny, with an increased penalty for an aggravated form of robbery, even though the offenses would usually be interrelated. The intent to make the offenses separate was indicated, not only by the fact that each was defined in a separate paragraph, but that each carried its own punishment provision, with the penalty for

larceny and burglary less than for robbery, in either the simple or aggravated form.*

The bill drafted by the Attorney General did not become law. It passed the Senate without material change,⁷ but the House Judiciary Committee struck out Section 2, punishing larceny, and Section 3, punishing burglary, and the bill was finally enacted without those sections.⁸ The statute as it was enacted in

*The Attorney General's statement before the House Judiciary Committee is not enlightening on this problem. He said (H. Rep. No. 1461, 73d Cong., 2d sess., p. 2):

"The bill provides punishment for those who rob, burglarize, or steal from such institutions, or attempt so to do. A heavier penalty is imposed, if in an attempt to commit any such offense any person is assaulted, or his life is put in jeopardy by use of a dangerous weapon. A maximum penalty is imposed on anyone who commits a homicide or kidnaping in the course of such unlawful act."

⁷The bill recommended by the Attorney General was introduced in the Senate on February 21, 1934 (78 Cong. Rec. 2946), was reported favorably by the Judiciary Committee without material amendment (S. Rep. No. 537, 73d Cong., 2d sess.), and passed the Senate without debate (78 Cong. Rec. 5738).

⁸The House Judiciary Committee, without explanation, struck out Sections 2 and 3 and renumbered Sections 4, 5, and 6 as Sections 2, 3, and 4, respectively (H. Rep. No. 1461, 73d Cong., 2d sess., p. 1). It also recommended an amendment making the death penalty provided by Section 5 of the Senate bill discretionary with the jury (*ibid*). The bill as thus amended passed the House after only meager discussion which sheds no light on the reasons for the committee's action (78 Cong. Rec. 8132-8133). The Senate disagreed with the House amendments and requested a conference (*id.*, 8264). The House agreed to a conference but insisted on its amendments (*id.*, 8322). The committee of conference recommended that the House amendments stand (H. Rep. No. 1598, 73d Cong., 2d sess.; 78 Cong. Rec. 8776), and the bill was finally enacted in that form (78 Cong. Rec. 8775, 8776, 8778, 8856, 8857). The bill became the Act of May 18, 1934, c. 304, 48 Stat. 783.

1934 is set out in Appendix B, *infra*, pp. 47-48. The legislative history throws no light upon the reasons for the changes but it has been suggested that they were made to confine the bill to situations in which the need to supplement local law enforcement had become imperative.*

Between 1934 and 1937, experience proved that the elimination of the larceny and burglary sections had been unfortunate. On March 17, 1937, Attorney General Cummings submitted to the Speaker of the House a draft of a bill to amend Section 2 (a) of the 1934 Act so as to include within its prohibitions the crimes of burglary (involved here) and larceny. H. Rep. No. 732, 75th Cong., 1st sess., Appendix C, *infra*, pp. 49-51.

Evidently because of the form in which the statute then read, with Section 2 (a) defining the offense of robbery, and Sections 2 (b) and 3 providing for increased punishment for the aggravated form of the offense (see fn. 8, *supra*, p. 23, Appendix B, *infra*, pp. 47-48, 48 Stat. 783), the proposal was to amend Section 2 (a) to add, after the definition of robbery, the definitions of burglary and larceny. Thus it was proposed to have the definition part of Section 2 (a) read:

Whoever, by force and violence, or by putting in fear, feloniously takes, or attempts to take,

* In 1 *Law and Contemporary Problems* (1934) 445, 448-449, the objections to Sections 2 and 3 of the Senate bill were attributed to Representative Sumners, the chairman of the House Judiciary Committee, who, it is said, "sought throughout the session to confine extensions of federal power to those situations where the need to supplement state and local law enforcing agencies had become imperative."

from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank; or whoever shall enter or attempt to enter any bank, or any building used in whole or in part as a bank, with intent to commit in such bank or building, or part thereof, so used, any larceny or other depredation; or whoever shall take or carry away, with intent to steal or purloin, any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of any bank, * * *.

There is nothing, however, to indicate that anyone thought this form of defining the initial offenses of robbery, burglary, and larceny in one section, rather than in separate sections as had originally been proposed in 1934, would have the effect of making one of the defined crimes merge in the other. (As noted *supra* at pp. 16-17 the separate offenses of receiving and agreeing to receive compensation involved in *Burton v. United States*, 202 U. S. 344, were defined in one paragraph.) The language defining burglary as entry with intent to commit "any larceny or other depredation" was evidently taken from section 190 of the Penal Code,¹⁰ as to post office offenses which, as noted

¹⁰ Section 190 had provided:

"Whoever shall forcibly break into or attempt to break into any post office, or any building used in whole or in part as a post office, with intent to commit in such post office, or building, or part thereof, so used, any larceny or other depredation, shall be fined * * *." But the Attorney General's proposal with

supra at pp. 15-16, had been held in *Morgan v. Devine*, 237 U. S. 632 to create an offense which was separate from a completed post office theft, and *a fortiori* from a completed robbery.

The amendment recommended by the Attorney General was introduced in the House by Representative Sumners (H. R. 5900, 75th Cong., 1st sess., 81 Cong. Rec. 2731) and was referred to the Committee on the Judiciary. That committee amended the clause defining the intent in burglary to read "any felony or larceny" instead of "any larceny or other depredation" (H. Rep. No. 732, 75th Cong., 1st sess.; Appendix C, *infra*, pp. 49-51).¹¹ No other changes were made in committee. An amendment to the larceny provision was subsequently offered on the floor of the House to distinguish between grand and petit larceny in response to Representative Wolcott's objection that the bill "puts simple larceny on the same plane as robbery and breaking and entering in an attempt to commit larceny. It seems to me a distinction

respect to the Bank Robbery amendment departed from Section 190 in that it made any entry with intent to commit larceny, rather than merely forcible entry, a crime. See *infra*, pp. 39-42.

¹¹ The reason for changing the phrase "any larceny or other depredation" to "any felony or larceny" does not appear in either the committee reports or the Congressional Record. A reasonable explanation is that the proposed draft was too harsh in punishing as burglary an entry accomplished without the use of force with intent to commit any "depredation" (see pp. 24-25, *supra*), and that for this reason the House Committee modified it by substituting a familiar modern definition of burglary. Moreover, the committee probably wished to avoid possible difficulties in interpretation by the use of the classic and more familiar definition of burglary as entering with intent to commit a felony. See p. 40 *infra*.

should be made between simple larceny within the building and robbery * * *":

Mr. RANKIN. How are you going to tell what a thief is going to do when he gets into a bank? If a man breaks into a house or bank he will kill anyone in it to carry out his purpose.

Mr. WOLCOTT. If the gentleman will read the bill and report, he will see that it not only punishes for robbery, which is putting in fear, and breaking and entering, but the larceny of anything within the bank, whether the man is there lawfully or not. If a man should go into a bank to make a deposit and pick up a pencil and walk out with it he would be on the same plane, according to this bill, as a man who deliberately broke in during the nighttime and committed larceny. I know the gentleman does not agree with that.

Mr. RANKIN. I do not, but if a man breaks into a house he is going to commit a crime.

Mr. WOLCOTT. There is no question about that. Breaking and entering is a crime in and of itself. [81 Cong. Rec. 4656]

Thereafter, the larceny provision was amended to distinguish between larcenies of property of a value exceeding \$50 and larcenies of property of lesser value. This satisfied the objection raised by Mr. Wolcott (81 Cong. Rec. 5376-5377).

It is thus clear that Mr. Wolcott's objection was to the severity of the punishment imposed by the bill, as introduced, for petit larcenies unaccompanied by burglary. There was no controversy—in fact, there was complete agreement—concerning the separateness of the offense of burglary, even though in the discussion

quoted above no accurate note was taken of the fact that burglary had been defined to include any entry with intent to commit a felony, rather than only a forcible one. Both amendments were adopted and, as thus amended, the bill passed the House (*Id.*, 5377). In the Senate, the Judiciary Committee merely adopted the House Committee's report (S. Rep. No. 1259, 75th Cong., 1st sess.) and the bill was passed without further change (81 Cong. Rec. 9331). It became the Act of August 24, 1937, c. 747, 50 Stat. 749.

The legislative history thus does not support petitioner's interpretation of the statute as creating only one offense where a completed robbery occurs. The statute as enacted in 1937 was essentially the same as that proposed by the Attorney General in 1934, defining the crimes which had long been held to be separate offenses—burglary,¹² larceny, and robbery. It differed from the original proposal in that greater punishment was imposed if in committing any such offense life was put in jeopardy by use of a dangerous weapon, whereas in the original draft only aggravated robbery was subject to the increased punishment. But that difference does not go to the essential point here, that the entry and the robbery are separate offenses.

¹² Petitioner concedes that he "is acutely aware of the fact that the crime of burglary *per se* does not necessarily merge into the culminated act" (Pet., p. 23).

C. THE JUDICIAL GLOSS WHICH HAD BEEN PLACED ON THE STATUTE BEFORE ITS REENACTMENT, AS WELL AS THE FORM OF ITS REENACTMENT IN THE 1948 REVISION OF THE CRIMINAL CODE, FURTHER SUPPORT THE VIEW THAT ENTRY WITH INTENT TO ROB AND ROBBERY ARE SEPARATE OFFENSES.

By the time the statute was reenacted in the 1948 revision of the Criminal Code, it had acquired considerable judicial gloss, which is reflected in the slight modifications made by the revisions. Both the gloss and the language changes tend to support the view that under this statute entry with intent to rob and the robbery are separate offenses.

In the period from 1937 to 1948, although there were not many decisions by this Court on multiple offenses arising from one transaction, they continued to reflect the settled interpretation of statutes as separately punishing the steps in one completed transaction. Thus, *Korematsu v. United States*, 323 U. S. 214, 222, noted that administrative orders regarding "separate steps in a complete evacuation program" imposed distinct duties and that disobedience of any one would have constituted a separate offense. The Court held in *American Tobacco Co. v. United States*, 328 U. S. 781, 787, that conspiracy in restraint of trade and a conspiracy to monopolize under Sections 1 and 2 of the Sherman Act, were separate offenses. And, as noted above (*supra*, p. 19), in *United States v. Michener*, 331 U. S. 789, it summarily reversed a holding that possession of a plate for counterfeiting and causing the plate to be manufactured constituted only one offense.

So ingrained in the thinking of federal prosecutors and federal district judges was the concept of separate punishment for separate steps of an offense that many of them did not realize, what the language of the statute clearly indicated, that the punishment provision for placing life in jeopardy in Section 2 (b) (12 U. S. C. (1946 ed.) 588b (b)) was intended merely to provide increased punishment for the aggravated form of the offenses defined in Section 2 (a) (whether before or after the 1937 amendment), and was not the definition of a separate offense. See *Holiday v. Johnston*, 313 U. S. 342. The resentencing of many defendants who had been given consecutive sentences, both for the robbery itself and for the aggravated form of the offense, became necessary. *E. g.*, *Ward v. United States*, 183 F. 2d 270 (C. A. 10); *Gant v. United States*, 161 F. 2d 793 (C. A. 5); *O'Keith v. United States*, 158 F. 2d 591 (C. A. 5); *Crum v. United States*, 151 F. 2d 510 (C. A. 9); *Miller v. United States*, 147 F. 2d 372 (C. A. 2); *Barkdoll v. United States*, 147 F. 2d 617 (C. A. 9); *Wilson v. United States*, 145 F. 2d 734 (C. A. 9); *Vautrot v. United States*, 144 F. 2d 740 (C. A. 8); *McDonald v. Moinet*, 139 F. 2d 939 (C. A. 6), certiorari denied, 322 U. S. 730; *Lockhart v. United States*, 136 F. 2d 122 (C. A. 6); *Holbrook v. United States*, 136 F. 2d 649 (C. A. 8); *Dimenza v. Johnston*, 130 F. 2d 465 (C. A. 9); *Durrett v. United States*, 107 F. 2d 438 (C. A. 5). In the process of correcting improper sentences, most of the Courts of Appeals which dealt with the question carefully distinguished the problem

of the punishment for the aggravated form of the offense, as provided in Section 2 (b), from the problem of the separateness of the crimes of burglary, robbery, and larceny, as defined in Section 2 (a). They held, in accordance with the settled principles discussed above, that, while Section 2 (b) provided only for increased punishment, Section 2 (a) defined four distinct crimes—robbery, burglary, grand and petit larceny.

In *Wells v. United States*, 124 F. 2d 334 (C. A. 5), certiorari denied, 316 U. S. 661 (No. 925, O. T. 1941), the defendant had pleaded guilty to an indictment in four counts charging violations of the Bank Robbery Act, as amended in 12 U. S. C. (1946 ed.) 588b. Counts 1 and 4 charged robbery of a bank by force and entering the bank with intent to commit a felony; counts 2 and 3, assault and the placing of life in jeopardy in the course of committing the robbery. Wells had originally been given consecutive sentences of 20, 25, 25 and 20 years, respectively, on each count. The Court of Appeals held, in a proceeding to correct sentence, that counts 1, 2 and 3 charged only one offense, *i. e.*, robbery of a bank under aggravated circumstances, for which the maximum sentence was twenty-five years. It also ruled, however, that the charge in count 4, entering a bank with intent to commit a felony, was a separate offense from the robbery charged in the other counts, with the result that the separate sentence of 20 years on that count was valid. 124 F. 2d 334. A petition for certiorari by Wells

attacking that aspect of the decision was denied by this Court, 316 U. S. 661.¹³

The Tenth Circuit, in *Rawls v. United States*, 162 F. 2d 798, certiorari denied, 332 U. S. 781,¹⁴ where the issue raised was identical to that involved here, and in dicta in *Ward v. United States*, 183 F. 2d 270, and in *Holbrook v. Hunter*, 149 F. 2d 230, also ruled that the entry and the robbery were separate. The Eighth Circuit in dictum in *Audett v. United States*, 132 F. 2d 528, certiorari denied, *sub nom. Audett v. Johnston*, 323 U. S. 743, and the Seventh Circuit, also in dictum, in *Steffler v. United States*, 143 F. 2d 772, certiorari denied, 323 U. S. 746, agreed with the Fifth Circuit on the issue raised there. The *Steffler* and *Audett* cases presented simply the

¹³ That ruling has been adhered to by the Fifth Circuit in other proceedings by Wells (158 F. 2d 833, certiorari denied, 331 U. S. 852; 210 F. 2d 112) and in *McNealy v. United States*, 164 F. 2d 600. See also its prior decision in *Durrett v. United States*, 107 F. 2d 438. In *Heflin v. United States*, 223 F. 2d 371 (C. A. 5), which was decided after the 1948 revision, there was a sentence for the aggravated form of robbery and separate consecutive sentences for the lesser form of robbery, and for larceny. The government's confession of error failed to make the distinction that, while the lesser form of the offense is included in the aggravated form, larceny and robbery are separate. In accepting the government's confession of error in *Heflin*, *supra*, at p. 376, the Fifth Circuit, contrary to its earlier decisions, said that 18 U. S. C. 2113 (a), (b) and (d) have "been construed as not creating separate offenses, but only as creating different maximum punishments for a single offense depending on the existence of aggravating circumstances" and held that only one sentence should have been imposed. But the court below in the instant case (R. 13-14) explained its *Heflin* decision as being based on the government's concession and said that it did "not wish that case to stand as authority for the view that in this respect the sentence was illegal".

¹⁴ The *Rawls* petition for certiorari was denied as out of time. No. 61 Misc., O. T. 1947.

question of whether the indictments properly charged the offense of entering a bank with intent to commit a felony under the Bank Robbery Act, and did not raise the question of whether the court could punish separately for the commission of the entry where the defendant at the same time was convicted for other criminal acts under the Act. But in the opinions in *Steffler* and *Audett, supra*, the Seventh and Eighth Circuits said that 12 U. S. C. (1946 ed.) 588b (a) defined taking and entering as separate and distinct offenses. Cf. *Gebhart v. United States*, 163 F. 2d 962, 963, and *Hewitt v. United States*, 110 F. 2d 1, 11, certiorari denied, 310 U. S. 641, where the Eighth Circuit said in cases involving robbery and aggravated robbery, for which (as already discussed above) separate sentences cannot be imposed, that one transaction results in only one offense under the Bank Robbery Act.

The only ruling to the contrary on the particular problem involved here, before enactment of the 1948 revision, is that of the Sixth Circuit in *Simunov v. United States*, 162 F. 2d 314, where the indictment under the predecessor statute, 12 U. S. C. (1946 ed.) 588b, charged Simunov in four counts with (1) entry, (2) theft, (3) putting a bank officer's life in jeopardy by the use of a dangerous weapon, and (4) kidnapping. Upon conviction, the judge sentenced him to a blanket sentence of 65 years, and added "25 years for kidnapping." In a motion to vacate, Simunov urged that, since he had been sentenced to 25 years for kidnapping, the court was without power to add another 40 years under the first three counts because

these counts merged into the fourth kidnapping count. The government contended that the convicting court intended to sentence Simunov to a term of 65 years of which 25 years constituted the kidnapping sentence. The court rejected the government's contention and said that "without the element of kidnapping the court could not have sentenced the defendant to a term of 40 years", implying apparently that defendant could not properly be sentenced under counts 1, 2 and 3, since the crimes in those counts became merged with the offense under the count 4. Stating (at p. 315) that "It is now settled that the statute dealing with the offense of bank robbery creates but a single offense with various degrees of aggravation permitting sentences of increasing severity", the court indicated that the defendant's sentence could not exceed 25 years, and reversed and remanded. While the particular issue involved here was not delineated in that case and was obscured by the ambiguity of the sentence, the government had argued that separate sentences could be imposed for the entry and for the combined theft and putting life in jeopardy. The court, in ruling that the defendant could not have been sentenced to 40 years under the first three counts, in effect decided the problem involved here in a way contrary to the view of the court below. The *Simunov* decision was reaffirmed by the Sixth Circuit in *Price v. United States*, 193 F. 2d 523, which related to a co-defendant of Simunov but where a sentence for entry was not involved.

As for the Ninth Circuit, the court below, citing *Barkdoll v. United States*, 147 F. 2d 617 (C. A. 9),

stated (R. 11) that "the Ninth Circuit in a clear dictum has indicated that it is in accord with this [the *Simunov*] view." That court said in *Barkdoll, supra*, at p. 617: "This Court has held that Section 588b defines one crime, aggravated or not aggravated. Only one sentence can be imposed," and cited its earlier decisions in *Dimenza v. Johnston, supra*, and *Wilson v. United States, supra*. But *Dimenza* and *Wilson, supra*, involved the distinction between robbery and aggravated robbery and, as shown above, all courts agree that only one sentence can be imposed for the aggravated offense. Although it is not completely clear from the opinion what was involved in *Barkdoll*, it appears that as in *Wilson* and *Dimenza, supra*, robbery and aggravated robbery were charged in two of the counts on which consecutive sentences were imposed.

Thus, before the 1948 revision, two circuits had squarely held, and two others had clearly indicated, that they regarded entry with intent to rob and robbery as separate offenses, while only one circuit held, obliquely, and another had at most indicated, even more obliquely,¹⁵ that the offense merged.

¹⁵ More recently, after a District Court had held in *Wells v. Scope*, 121 F. Supp. 718, as to the same *Wells* involved in the Fifth Circuit decisions discussed *supra*, pp. 31-32, that consecutive sentences could not properly have been imposed for the entry and the robbery, the Ninth Circuit in reversing on jurisdictional grounds said: "Although it well may be that the offense charged in count four merged into that charged in count three, and [sic] the district court was without jurisdiction to grant the relief requested * * *." *Madigan v. Wells*, 224 F. 2d 577, 578 (C. A. 9), certiorari denied, 351 U. S. 911.

In the revision under the Act of June 25, 1948, c. 645, section 1, 62 Stat. 796, Section 2113 was enacted in the form quoted *supra*, pp. 2-4. The Appendix to House Report No. 304, 80th Cong., 1st sess., p. 135, states that the 1948 revision principally consolidated 12 U. S. C. (1940 ed.) 588a, 588b and 588c and that no substantial changes were made in the statute itself. However, it was noted that the use of the word "felony" under the 1937 amendment caused confusion and accordingly Congress changed the Bank Robbery Act, in the 1948 codification, to conform with this Court's decision in *Jerome v. United States*, 318 U. S. 101, that the word "felony" as used in 18 U. S. C. 2113 (a) covered only federal and excluded state felonies. This awareness, on the part of the revisers, of federal decisions under the Act suggests that if they had intended that the offenses of robbery and entry under the Bank Robbery Act should not be distinct and separate offenses punishable as such, they would have changed the Act accordingly. Instead, the structural change to include robbery in one paragraph of Section 2113 (a) and entry in another paragraph, and the separate statement of two alternative larceny offenses in paragraph (b), indicated recognition of the majority of the decisions that Section 2113 (a) covered robbery and entry as two separate and distinct offenses which were separately punishable. Moreover, the statute provides in subdivision (d), *supra*, p. 3, that whoever "in committing, or in attempting to commit, *any* offense defined in subsections (a) and (b) of this section, assaults any person", shall be given the heavier punishment (emphasis added). The use of *any* of-

fense in this context itself suggests that each definition in subsections (a) and (b) relates to a distinct offense, any one of which may be committed in aggravated form.

The problem raised by petitioner as to how the punishment provision for aggravated offenses can be applied if entry and robbery are considered separate offenses is thus clearly answered by the revision, as we think it was also by the 1937 amendment. It is possible for life to be put in jeopardy in making the entry, as well as later in taking money from a person. In this event two aggravated offenses have been committed. The fact that the provision prescribing punishment for aggravated offenses may be said to merge with the provision prohibiting the offense so committed does not mean that separate offenses are themselves merged because both are aggravated.¹⁶

It is also possible to make an entry without putting life in jeopardy and then place life in jeopardy in the robbery—committing two offenses, one of which is aggravated. The provision for punishment of aggravated offenses thus in no way affects the interpreta-

¹⁶ Cf. *Casebeer v. United States*, 87 F. 2d 668 (C. A. 10), certiorari denied *Casebeer v. Hudspeth*, 316 U. S. 683 (aggravated robbery and kidnapping two distinct offenses.) In *Clark v. United States*, 184 F. 2d 952 (C. A. 10), certiorari denied, 340 U. S. 955, the Tenth Circuit described the robbery, held to state an offense separate and distinct from the kidnapping, as being aggravated, but it appears that only a simple bank robbery had been charged. Brief in Opposition, p. 2, No. 260 Misc., O. T. 1950. See also *Gilmore v. United States*, 124 F. 2d 537 (C. A. 10), certiorari denied, 316 U. S. 661 (aggravated robbery and killing in attempt to escape custody separate offenses).

tion of this statute as prohibiting and punishing each step separately, *i. e.*, the entry with intent to rob and the robbery.

In sum, the government submits that the Bank Robbery Act should be construed in the same manner in which federal criminal statutes had been interpreted for many years preceding its enactment and revision. That is the manner in which the cognate post office statute had been interpreted by this Court in *Morgan v. Devine*, 237 U. S. 632. There is nothing to indicate that Congress intended any different method of interpretation as to this statute.

II

ENTRY UNACCOMPANIED BY FORCE BUT WITH INTENT TO ROB IS AN OFFENSE UNDER THE STATUTE WHICH DOES NOT, AS A MATTER OF DOUBLE JEOPARDY, MERGE INTO THE COMPLETED ROBBERY

Insofar as petitioner bases his argument on the nature of the entry in this case, there is a serious problem as to whether the issue can be raised at this time. The indictment charged merely entry with intent to rob, without characterizing the nature of the entry. If only forcible entries are criminal, whether entry was accomplished by petitioner without the use of force goes to the sufficiency of the evidence at the trial, a matter not normally cognizable on collateral attack. *Sunal v. Large*, 332 U. S. 174. The rule has been that, where an indictment on its face purports to charge a federal offense, it cannot be challenged unless it appears on the face that no federal offense

could possibly be committed. See *Kelly v. Johnston*, 128 F. 2d 793 (C. A. 9), certiorari denied, 317 U. S. 699, where the indictment was challenged in a collateral attack as being fatally defective on the ground that it charged robbery of mail matter (then 197 of the Criminal Code, now 18 U. S. C. 2114) and there was proof at the habeas corpus hearing that what was taken was not "mail matter"; the court held that the issue could not be raised on collateral attack.

However, in *Bell v. United States*, 349 U. S. 81, *supra* p. 20 fn. 3, where the indictment in two counts alleged the same facts as to the transportation of two different women, the Court assumed the undenied fact that there was only one transportation and decided the case on that basis. The Court may also consider that, in this case, the failure to characterize the entry justifies the assumption (supported by the supplemental record filed by petitioner) that the entry was unaccompanied by force and occurred in the daytime. We therefore discuss the problem on this assumption.

A. THE STATUTE ITSELF AND ITS LEGISLATIVE HISTORY MAKE IT CLEAR THAT ANY ENTRY WITH THE REQUISITE INTENT IS A COGNIZABLE OFFENSE UNDER 18 U. S. C. 2113 (3)

The statute on its face has no language limiting its application only to forcible entries. It punishes anyone who "enters or attempts to enter" any of the specified institutions "with intent to commit * * * any felony affecting such bank * * *".

As shown by the legislative history discussed *supra*, pp. 25-26, fn. 10, the omission of a provision for breaking and entering, or for forcible entry, must have been

deliberate. The draft of the act submitted in 1934 employed the usual definition of burglary as a breaking into with intent. See Appendix A, *infra*, pp. 46-47. The 1937 amendment submitted by the Attorney General was evidently modeled on Section 190 of the Penal Code which used the words "forcibly break into" any post office. Thus, there were sufficient models for a correct statement of the usual definition of burglary if that had been the intent of the legislation. The omission of the word "forcibly" must therefore have been specifically designed to cover any entry with intent to commit a felony in order to make sure that one who entered a bank with the requisite intent would be punished, even if he entered without using force and in the daytime. This was in line with developing concepts of burglary, for by that time a number of states had by statute eliminated the necessity for a breaking, and had defined burglary to include any entry with intent to commit a felony. See, *e. g.*, § 459, Penal Code of California, Deering (1937); Miller, *Criminal Law*, (1934) p. 339; *State v. Petit*, 32 Wash. 129, 72 P. 1021; *People v. Webber*, 138 Cal. 145, 70 P. 1089.

It is true that, during the debates on the floor of the House on the 1937 amendment, Congressman Wolcott spoke about the statute as creating the offense of "breaking and entering", see *supra*, pp. 26-27. But as shown in the legislative history of the amendment under Point I of this brief (*supra*, pp. 21-28), that discussion was concerned principally with the larceny provisions of the amendment, and there is no indica-

tion that Congressman Wolcott intended in his discussion to limit the burglary portion of the amendment merely to forcible entry.

Moreover, before the 1948 revision, this issue had been settled by the courts, without disagreement. For example, in *Alford v. United States*, 113 F. 2d 885, 886-887 (C. A. 10), where the entry into the bank was made by the defendant as a customer, defendant contended that entry under the Act must be accompanied "with force and violence or by putting in fear". The Court of Appeals in rejecting this interpretation said:

* * * We cannot agree with this construction. The section defines four separate and distinct offenses. The first is an offense in the nature of robbery. The second is an offense in the nature of burglary, entry of a bank with intent to commit a felony or larceny therein, except that forcible entry is not made an element. The third and fourth are offenses in the nature of grand and petit larceny, respectively. Force and violence or putting in fear is an element of robbery, but not of burglary or larceny.

In *Audett v. United States*, 132 F. 2d 528, 529 (C. A. 8), certiorari denied, *Audett v. Johnston*, 323 U. S. 743, although it does not appear whether the issue was raised there, the court said: "It is true the word 'enter' has a broad range of significance. It may include, as appellant points out, walking in a stream of customers through the front door of the bank in business hours * * *." See also *Steffler v. United States*, 143 F. 2d 772 (C. A. 7), certiorari denied, 323 U. S. 746; *Rawls v. United States*, 162 F. 2d 798 (C. A. 10).

The continuation of the former phraseology in the revision was thus an acceptance of the interpretation which the words in themselves clearly required.

Petitioner suggests that Congress could not have intended to make entry unaccompanied by force an offense in view of the maximum punishment of twenty years' imprisonment. The short answer is that the twenty year term is a maximum, and not a minimum term. There is, in the present statute, no minimum, and in the former statute the minimum was one year. Congress, having defined the offense of entry in broad terms to cover entries unaccompanied by force as well as forcible entries, also provided a wide range of permissible punishments within which the trial judge could exercise his discretion on the basis of the particular facts. Moreover, it certainly does not offend one's sense of justice to say that Congress has dealt more severely with one who enters a bank having planned to commit a felony than with one who enters innocently and thereafter yields to a sudden temptation.

B. AN ENTRY UNACCOMPANIED BY FORCE DOES NOT MERGE IN THE COMPLETED OFFENSE OF ROBBERY AS A MATTER OF THE CONSTITUTIONAL PROTECTION AGAINST DOUBLE JEOPARDY

Petitioner also suggests that, even if an entry unaccompanied by force could itself be an offense under the statute, when it is part of a completed robbery it necessarily merges into the robbery so that, as a matter of the constitutional protection against double jeopardy, separate punishment cannot be imposed for the entry.

We have already shown, in Point I, that as matter of statutory construction, the offense of burglary as defined in the statute—entry with intent to commit a felony—is separate and distinct from the completed robbery. The cases there discussed in relation to the problem of statutory construction, many of which arose in the context of double jeopardy, are dispositive of this contention as well. If the offenses created by the statute were intended to be distinct, they cannot be held to have merged with each other unless they are, in their definition, so inseparable that one necessarily and inevitably embraces the other. The elements of the offense, and not the evidence adduced in any particular case, govern the application of the prohibition against double jeopardy. *Pinkerton v. United States*, 328 U. S. 640, 643-644; *Blockburger v. United States*, 284 U. S. 299, 304.

The test generally applied is whether one offense requires proof of elements different from those required for the other. *Gavieres v. United States*, 220 U. S. 338, 342; *Carter v. McClaughry*, 183 U. S. 365, 395. The elements of the offense of entry with intent to rob, with or without force, are quite different from the elements of the offense of robbery. The first paragraph of 18 U. S. C. 2113 (a), upon which count 1 was based, declares the taking by intimidation of property belonging to a federally-insured bank to be a crime regardless of the place from which the property is taken." Under this charge, proof of entry

"Thus, 18 U. S. C. 2113 (a) may be violated without any entry of the bank by robbing an armored car or delivering agent as in the recent Boston Brinks robbery, or a bank messenger as in *White v. United States*, 85 F. 2d 268 (C. A. D. C.).

into the bank is not necessary. On the other hand, the offense proscribed in the second paragraph of section 2113 (a), and charged in count 2 of the indictment, is completed when the entry into the bank is effected with intent to commit a felony. The commission of the felony is unnecessary to the completion of the offense. Here, as in *Morgan v. Devine*, 237 U. S. 632, although the charges grew out of the same transaction, different evidence was needed to support the different charges. Hence, each could constitutionally be punished as separate and distinct offenses.

It is undoubtedly true that, in most cases of bank robbery, the robbery is preceded by the entry, just as in most cases (and as was the fact in *Albrecht v. United States*, 273 U. S. 1) a sale of liquor usually involves possession. Similarly, the charge involved in *United States v. Michener*, 331 U. S. 789, of the manufacture of a counterfeiting plate will usually be preceded by possession, there the subject of a separate count. And, as in *Burton v. United States*, 202 U. S. 344, receipt of unauthorized compensation is normally preceded by an agreement to receive. This Court has held these normal interrelationships irrelevant so long as the elements of the offense are different. Since the elements of entry with intent to commit a felony are different from the elements of robbery, whether the entry was forcible or not, the two offenses do not merge.

Petitioner suggests possible incongruities in sentencing that may arise, an argument frequently made when the issue involves multiple offenses. To this the

answer is that given by the Court in *Blockburger v. United States*, 284 U. S. at p. 305:

The plain meaning of the provision is that each offense is subject to the penalty prescribed; and if that be too harsh, the remedy must be afforded by act of Congress, not by judicial legislation under the guise of construction. Under the circumstances, so far as disclosed, it is true that the imposition of the full penalty of fine and imprisonment upon each count seems unduly severe; but there may have been other facts and circumstances before the trial court properly influencing the extent of the punishment. In any event, the matter was one for that court, with whose judgment there is no warrant for interference on our part.

CONCLUSION

It is respectfully submitted that the judgment below should be affirmed.

J. LEE RANKIN,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
FELICIA DUBROVSKY,
Attorneys.

DECEMBER 1956.

APPENDIX A

The 1934 Bank Robbery Bill, as it passed the Senate, provided as follows (78 Cong. Rec. 5738):

Be it enacted, etc., That as used in this act the term "bank" includes any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States.

SEC. 2. Whoever, not being entitled to the possession of property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, takes and carries away, or attempts to take and carry away, such property or money or any other thing of value from any place (1) without the consent of such bank, or (2) with the consent of such bank obtained by the offender by any trick, artifice, fraud, or false or fraudulent representation, with intent to convert such property or money or any other thing of value to his use or to the use of any individual, association, partnership, or corporation, other than such bank, shall be punished by a fine of not more than \$5,000 or imprisonment for not more than 10 years, or both.

SEC. 3. Whoever breaks into, or attempts to break into, any building or part thereof used as a place of business by any bank, with intent to commit in such building or part thereof so used any offense defined by this act or any felony under any law of the United States or under any law of the State, District, Territory, or possession where such building is located, shall be fined not more than \$5,000 or imprisoned not more than 10 years, or both.

SEC. 4. (a) Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank shall be fined not more than \$5,000 or imprisoned not more than 20 years, or both.

(b) Whoever, in committing, or in attempting to commit, any offense defined in subsection (a) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon, shall be fined not less than \$1,000 nor more than \$10,000 or imprisoned not less than 5 years nor more than 25 years, or both.

SEC. 5. Whoever, in committing any offense defined in sections 1, 2, or 3 [sic] of this act, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be punished by imprisonment for not less than 10 years, or by death.

SEC. 6. Jurisdiction over any offense defined by this act shall not be reserved exclusively to courts of the United States.

APPENDIX B

The 1934 Bank Robbery Act, as it was finally enacted, provided [48 Stat. 783]:

To provide punishment for certain offenses committed against banks organized or operating under laws of the United States or any member of the Federal Reserve System.

Be it enacted by the Senate and House of Representatives of the United States of America

in Congress assembled, That as used in this Act the term "bank" includes any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States.

SEC. 2. (a) Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank shall be fined not more than \$5,000 or imprisoned not more than twenty years, or both.

(b) Whoever, in committing, or in attempting to commit, any offense defined in subsection (a) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not less than \$1,000 nor more than \$10,000 or imprisoned not less than five years nor more than twenty-five years, or both.

SEC. 3. Whoever, in committing any offense defined in this Act, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be punished by imprisonment for not less than 10 years, or by death if the verdict of the jury shall so direct.

SEC. 4. Jurisdiction over any offense defined by this Act shall not be reserved exclusively to courts of the United States.

Approved, May 18, 1934.

APPENDIX C

75th Congress

1st Session HOUSE OF REPRESENTATIVES

Report

No. 732

AMEND THE BANK-ROBBERY STATUTE TO INCLUDE
BURGLARY AND LARCENY

April 30, 1937.—Referred to the House Calendar and ordered
to be printed

MR. HEALEY, from the Committee on the Judiciary,
submitted the following

REPORT

[To accompany H. R. 5900]

The Committee on the Judiciary, to whom was referred the bill (H. R. 5900) to amend the bank-robbery statute to include burglary and larceny, after consideration, report the same favorably to the House with an amendment with the recommendation that, as so amended, the bill do pass.

The committee amendment is as follows:

Page 2, line 2, after the word "any" insert "felony or", and after the word "larceny" strike out "or other depredation."

The Attorney General has recommended the enactment of this proposed legislation which is designed to enlarge the scope of the bank-robbery statute, enacted in 1934, (48 Stat. 783; U. S. C., title 12, sec. 588b) to include larceny and burglary of the banks protected by this statute. These are national banks, member banks of the Federal Reserve System, and banks insured by the Federal Deposit Insurance

Corporation. Your committee concurs in this recommendation.

There is attached hereto and made a part of this report the following communication from the Attorney General to the Speaker of the House in which he explains the desirability of the proposed amendment.

"OFFICE OF THE ATTORNEY GENERAL

Washington, D. C., March 17, 1937.

HON. WILLIAM B. BANKHEAD,
The Speaker, House of Representatives,
Washington, D. C.

My Dear Mr. SPEAKER: The act of May 18, 1934 (48 Stat. 783; U. S. C. title 12, secs. 588a to 588d), penalizes robbery of a national bank or a member bank of the Federal Reserve System. The class of banks protected by this statute was enlarged by section 333 of the act of August 23, 1935 (49 Stat. 720), to include all banks insured by the Federal Deposit Insurance Corporation.

The fact that the statute is limited to robbery and does not include larceny and burglary has led to some incongruous results. A striking instance arose a short time ago, when a man was arrested in a national bank while walking out of the building with \$11,000 of the bank's funds on his person. He had managed to gain possession of the money during a momentary absence of one of the employees, without displaying any force or violence and without putting any one in fear—necessary elements of the crime of robbery—and was about to leave the bank when apprehended. As a result, it was not practicable to prosecute him under any Federal statute.

The enclosed bill which has been drafted in this Department proposes to amend subsection (a) of section

2 of the above-mentioned statute so as to include within its prohibitions, the crimes of burglary and larceny of a bank covered by its provisions.

I am informed by the Acting Director of the Bureau of the Budget that this legislation is not in conflict with the program of the President and I recommend its enactment.

Sincerely yours,

HOMER S. CUMMINGS,
Attorney General."

In compliance with clause 2a of rule XIII there is printed below existing law in roman with new matter proposed to be inserted printed in italics:

"(a) Whoever, by force and violence, or by putting in fear feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank; *or whoever shall enter or attempt to enter any bank, or any building used in whole or in part as a bank, with intent to commit in such bank or building, or part thereof, so used, any felony or larceny; or whoever shall take or carry away, with intent to steal or purloin, any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of any bank,* shall be fined not more than \$5,000 or imprisoned not more than twenty years, or both."

SUPREME COURT OF THE UNITED STATES

No. 132.—OCTOBER TERM, 1956.

Ollie Otto Prince, Petitioner,	} On Writ of Certiorari	
v.		to the United States
United States of America.		Court of Appeals for the Fifth Circuit.

[February 25, 1957.]

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

The question presented by this case calls for interpretation of the Federal Bank Robbery Act. 18 U. S. C. § 2113.¹ That statute creates and defines several crimes incidental to and related to thefts from banks organized or insured under federal laws. Included are bank rob-

¹“(a) Whoever, by force and violence, or by intimidation, takes or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association; or

“Whoever enters or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part as a bank, or as a savings and loan association, with intent to commit in such bank, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny—

“Shall be fined not more than \$5,000 or imprisoned not more than twenty years, or both.

“(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding \$100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than \$5,000 or imprisoned not more than ten years, or both; or

“Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding

bbery and entering a bank with intent to commit a robbery.² We must decide here whether unlawful entry and robbery are two offenses consecutively punishable in a typical bank robbery situation.

Petitioner entered the Malone State Bank, in Malone, Texas, through an open door and during regular banking hours. He asked for and received certain directions. Thereupon he displayed a revolver, intimidating a bank employee and putting his life in jeopardy, and thus consummated a robbery. A grand jury returned a two-count indictment against him. The first charged the robbery offense; the second, entering the bank with the intent to commit a felony. Petitioner was convicted on both counts, and the district judge sentenced him to 20 years for robbery and 15 years for entering. The sentences were directed to be served consecutively. Some years thereafter, petitioner filed a "Motion to Vacate or Correct Illegal Sentence." The District Court, treating it as a proceeding under Rule 35 of the Federal Rules of Criminal Procedure, denied relief without conducting a hearing. The Court of Appeals for the Fifth Circuit affirmed. 230 F. 2d 568.

Whether the crime of entering a bank with intent to commit a robbery is merged with the crime of robbery

\$100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

"(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than \$10,000 or imprisoned not more than twenty-five years, or both."

² As used in this opinion, "robbery" and "larceny" refer not to the common-law crimes, but rather to the analogous offenses in the Bank Robbery Act.

when the latter is consummated has puzzled the courts for several years. A conflict has arisen between the circuits.³ We granted certiorari because of the recurrence of the question and to resolve the conflict. 351 U. S. 962. In addition to the Court of Appeals cases on the precise question, both petitioner and the Government cite as analogous other cases that involved fragmentation of crimes for purposes of punishment.⁴ None of these is particularly helpful to us because we are dealing with a unique statute of limited purpose and an inconclusive legislative history. It can and should be differentiated from similar problems in this general field raised under

³ In accord with the decision of the Fifth Circuit is its own earlier ruling in *Durrett v. United States*, 107 F. 2d 438, and *Rawls v. United States*, 162 F. 2d 798, decided by the Tenth Circuit. Another decision of the Fifth Circuit affirmed consecutive sentences for robbery and entering with intent to commit robbery. *Wells v. United States*, 124 F. 2d 334. However, the prisoner, appearing *pro se*, had not raised a question of merger of these offenses in that proceeding. When he tried to do so later, the court held that he was barred on the ground that he was making a second motion under 28 U. S. C. § 2255 for similar relief on behalf of the same prisoner. *Wells v. United States*, 210 F. 2d 112. Finally he sought remedy by writ of habeas corpus, but the Ninth Circuit concluded that the earlier § 2255 proceedings precluded jurisdiction. *Madigan v. Wells*, 224 F. 2d 577, reversing *Wells v. Swope*, 121 F. Supp. 718.

Contrary to the Fifth and Tenth Circuits is determination of the Sixth Circuit in *Simunov v. United States*, 162 F. 2d 314, and a District Court in *Wells v. Swope*, *supra*. To the same effect are dicta in Ninth Circuit cases. *Madigan v. Wells*, *supra*, at 578; *Barkdoll v. United States*, 147 F. 2d 617.

⁴ *United States v. Michener*, 331 U. S. 789; *United States v. Raynor*, 302 U. S. 540; *Blockburger v. United States*, 284 U. S. 299; *United States v. Adams*, 281 U. S. 202; *Albrecht v. United States*, 273 U. S. 1; *Morgan v. Devine*, 237 U. S. 632; *Gavieres v. United States*, 220 U. S. 338; *Burton v. United States*, 202 U. S. 344; *Carter v. McClaughry*, 183 U. S. 365. See also *Bell v. United States*, 349 U. S. 81; *United States v. Universal C. I. T. Credit Corp.*, 344 U. S. 218; *Ebeling v. Morgan*, 237 U. S. 625; *United States v. Daugherty*, 269 U. S. 360.

other statutes. The question of interpretation is a narrow one, and our decision should be correspondingly narrow.

The original Bank Robbery Act was passed in 1934. It covered only robbery, robbery accompanied by an aggravated assault, and homicide perpetrated in committing a robbery or escaping thereafter. In 1937 the Attorney General requested that the Act be amended. In his letter proposing the bill, the Attorney General declared that "incongruous results" had developed under the existing law. He cited as a striking instance the case of

"... a man [who] was arrested in a national bank while walking out of the building with \$11,000 of the bank's funds on his person. He had managed to gain possession of the money during a momentary absence of one of the employees, without displaying any force or violence and without putting anyone in fear—necessary elements of the crime of robbery—and was about to leave the bank when apprehended. As a result it was not practicable to prosecute him under any Federal Statute."

The Act was amended accordingly to add other crimes less serious than robbery. Two larceny provisions were enacted: one for thefts of property exceeding \$50, the other for lesser amounts. Congress further made it a crime to

"... enter or attempt to enter any bank, with intent to commit in such bank or building, or part thereof, so used, any felony or larceny"

Robbery, entering and larceny were all placed in one paragraph of the 1937 Act.⁵

⁵ This appeared in 12 U. S. C. (1946 ed.) § 588b (a). The statute in its present form was enacted by the June 1948 revision. 18 U. S. C. § 2113 (a). The legislative history indicates that no sub-

Congress provided for maximum penalties of either a prison term or a fine or both for each of these offenses. Robbery remained punishable by 20 years and \$5,000. The larceny penalties were set according to the degree of the offense. Simple larceny could result in 1 year in jail and \$1,000 fine, while the maximum for the more serious theft was set at 10 years and \$5,000. No separate penalty clause was added for the crime of unlawfully entering. It was simply incorporated into the robbery provision.*

The Government asks us to interpret this statute as amended to make each a completely independent offense. It is unnecessary to do so in order to vindicate the apparent purpose of the amendment. The only factor stressed by the Attorney General in his letter to Congress was the possibility that a thief might not commit all the elements of the crime of robbery. It was manifestly the purpose of Congress to establish lesser offenses. But in doing so there was no indication that Congress intended also to pyramid the penalties.

The Attorney General cited the situation of larceny to illustrate his position. It is highly unlikely that he would have wanted to have the offender given 10 years

stantial change was made in this revision. It segregated the larceny provisions in § 2113 (b), leaving robbery and unlawful entry in § 2113 (a). See note 1, *supra*.

*The Bank Robbery Act has, since it was passed in 1934, contained a special provision for increased punishment for aggravated offenses. One who, in committing robbery, assaults any person or puts the life of any person in jeopardy by the use of a dangerous weapon can be sentenced to 25 years in jail or fined \$10,000 or both. When the Act was amended in 1937 to add larceny and unlawful entry, these were incorporated in the same paragraph with robbery and thus made subject to the increased penalty under aggravating circumstances. This provision currently is found in 18 U. S. C. § 2113 (d). See note 1, *supra*.

for the larceny plus 20 years for entering the bank with intent to steal. There is no reason to suppose that he wished to have the maximum penalty for robbery doubled by the imposition of 20 years for the robbery to which could be added 20 years for entering the bank.⁷ Nor is there anything in the reports of the House of Representatives or the Senate or the floor debates to warrant such a reading of the statute.⁸

It is a fair inference from the wording in the Act, uncontradicted by anything in the meager legislative history, that the unlawful entry provision was inserted to cover the situation where a person enters a bank for the purpose of committing a crime, but is frustrated for some reason before completing the crime. The gravamen of the offense is not in the act of entering, which satisfies the terms of the statute even if it is simply walking through an open, public door during normal business hours.⁹ Rather the heart of the crime is the intent to steal. This mental

⁷ Under the Government view, if carried to its logical extreme, one who enters a bank and commits a robbery could be sentenced to 20 years for robbery, 10 years for larceny and 20 years for unlawful entry. The Government conceded that this was error in *Heflin v. United States*, 223 F. 2d 371 (robbery and larceny). However, it now declares that its confession of error was made by mistake and that larceny and robbery are separate offenses, cumulatively punishable.

⁸ H. R. Rep. No. 732, 75th Cong., 1st Sess.; S. Rep. No. 1259, 75th Cong., 1st Sess.; 81 Cong. Rec. 2731, 4656, 5376-5377, 9331.

⁹ This distinguishes the unlawful entry provision in the Bank Robbery Act from a very similar provision relating to post office offenses. 18 U. S. C. § 2115.

"Whoever shall *forcibly* break into or attempt to break into any post office, or any building used in whole or in part as a post office, with intent to commit in such post office, or building, or part thereof, so used, any larceny or other depredation, shall be fined. . . ." (Italics supplied.)

This section was held to create an offense separate from a completed post office theft. *Morgan v. Devine*, 237 U. S. 632.

element merges into the completed crime if the robbery is consummated. To go beyond this reasoning would compel us to find that Congress intended, by the 1937 amendment, to make drastic changes in authorized punishments. This we cannot do. If Congress had so intended, the result could have been accomplished easily with certainty rather than by indirection.¹⁰

We hold, therefore, that when Congress made either robbery or an entry for that purpose a crime it intended that the maximum punishment for robbery should remain at 20 years,¹¹ but that even if the culprit should fall short of accomplishing his purpose, he could be imprisoned for 20 years for entering with the felonious intent.

While reasonable minds might differ on this conclusion, we think it is consistent with our policy of not attributing to Congress, in the enactment of criminal statutes, an intention to punish more severely than the language of its laws clearly imports in the light of pertinent legislative history.

¹⁰ Further evidence that Congress was concerned only with proscribing additional activities and not with alteration of the scheme of penalties is revealed by the form in which the bill was cast. Introduced in the House of Representatives, the proposal merely interjected into the robbery provision clauses making larceny and entering criminal. H. R. 5900, 75th Cong., 1st Sess.; H. R. Rep. No. 732, 75th Cong., 1st Sess. 2. All three would have made violators subject to the existing penalty clause. During the debate on the floor, Rep. Wolcott pointed to the incongruity of establishing degrees of larceny without corresponding discrimination in punishment. 81 Cong. Rec. 4656. The Committee on the Judiciary then amended the bill to provide for punishments related to the larceny offenses. 81 Cong. Rec. 5376-5377. The Senate accepted the House version without debate. 81 Cong. Rec. 9331; see S. Rep. No. 1259, 75th Cong., 1st Sess.

¹¹ In this case, petitioner was convicted of robbery aggravated by assault with a deadly weapon and was subject to the maximum of 25 years provided in 18 U. S. C. § 2113 (d). See note 6, *supra*.

The judgment of the Court of Appeals is reversed and the case is remanded to the District Court for the purpose of resentencing the petitioner in accordance with this opinion.

Reversed and remanded.

MR. JUSTICE BURTON dissents for the reasons stated in the opinion of the Court of Appeals, 230 F. 2d 568.

MR. JUSTICE BLACK took no part in the consideration or decision of this case.